1915

In the Supreme Court of the United States

No. 2 Original. October Term, 1913.

COMMONWEALTH OF VIRGINIA,

v.

STATE OF WEST VIRGINIA.

NOTICE OF MOTION.

In the Supreme Court of the United States

No. 2 Original. October Term, 1913.

COMMONWEALTH OF VIRGINIA,

v.

STATE OF WEST VIRGINIA.

NOTICE OF MOTION.

Richmond, Virginia, February 2nd, 1915.

To the Honorable A. A. Lilly,
Attorney General of West Virginia,
Charleston, West Virginia.

Please take notice that in the suit of the Commonwealth of Virginia against the State of West Virginia, No. 2 Original, pending in the Supreme Court of the United States at Washington, D. C., the Commonwealth of Virginia will, on Monday, March 1st, 1915, move the said Court to set the said case down for hearing upon the report of the Special Master filed January 21st, 1915, and on such exceptions as may be filed thereto by either party.

Respectfully,

COMMONWEALTH OF VIRGINIA,

By JOHN GARLAND POLLARD,
Attorney General of Virginia.

Legal service of the within notice is hereby accepted, this February 8, 1915.

A. A. LILLY,
Attorney General.

FILE COPY.

Office Supreme Court, U. S.
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CLERK.

In the Supreme Court of the United States

No. 2. Original. October Term, 1913.

COMMONWEALTH OF VIRGINIA,

v.

STATE OF WEST VIRGINIA.

In Equity.

MOTION OF THE COMPLAINANT.

SUPPLEMENT TO RECORD.

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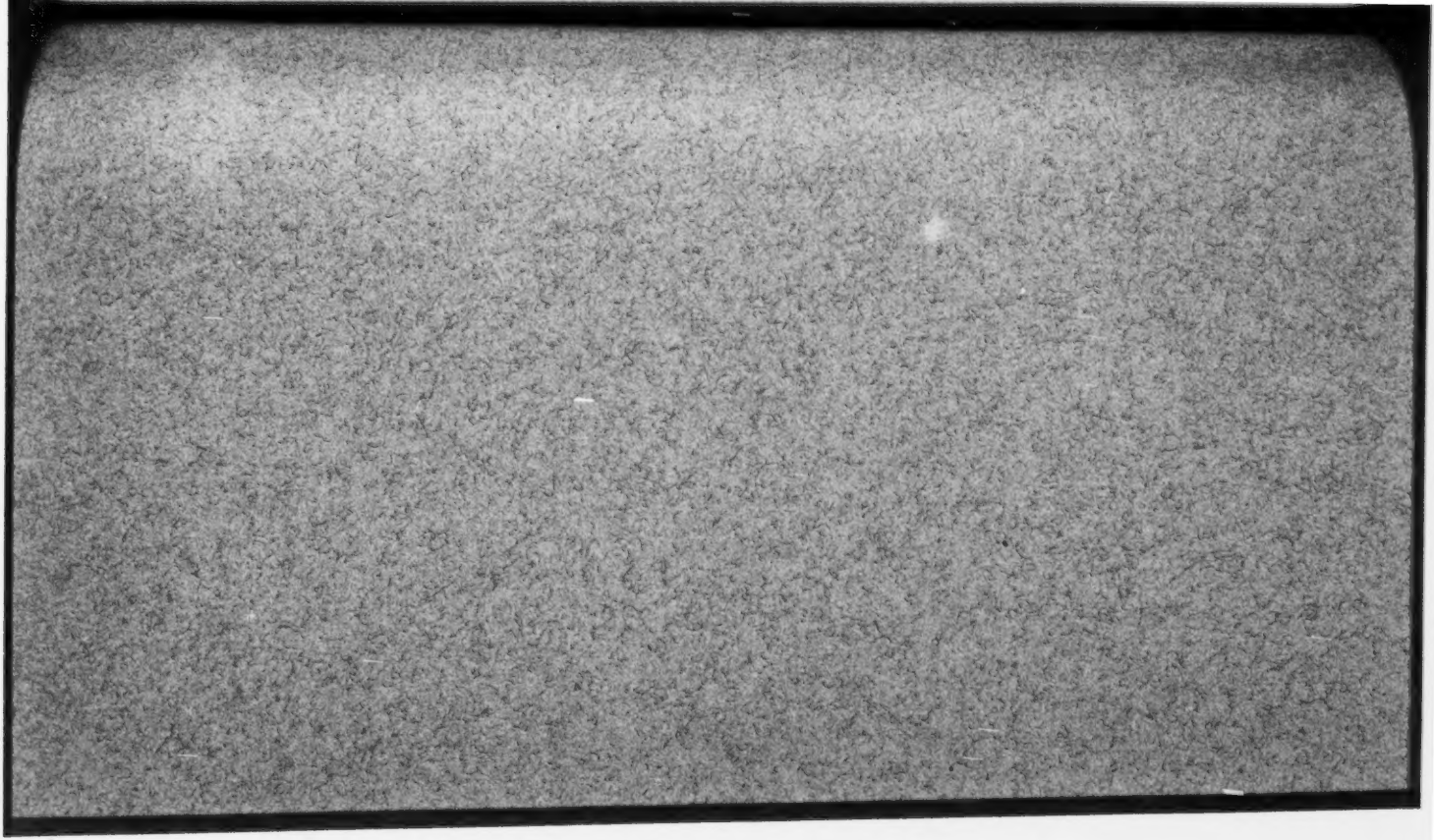

In the Supreme Court of the United States

No. 2. Original. October Term, 1913.

COMMONWEALTH OF VIRGINIA,

v.

STATE OF WEST VIRGINIA.

In Equity.

MOTION OF THE COMPLAINANT.

SUPPLEMENT TO RECORD.

The following correspondence having taken place since the preparation of the notice given in this case, which is returnable on the first day of the October term of the court, 1913, is submitted by way of supplement to the record presented in the said notice, to-wit:

(Copy)

FAIRMONT, WEST VIRGINIA,
September 22, 1913.

My Dear Sir:

I am instructed by a sub-committee of the West Virginia commission, appointed by the Governor of that State to negotiate a settlement, in accordance with the suggestions of

the Supreme Court of the United States, of the controversy between the States of Virginia and West Virginia, relative to the settlement of the Virginia debt, to say to you, and through you to the Virginia commission, that the West Virginia commission has in course of preparation a proposition to be presented to your commission at the earliest moment; but that it will yet require some three or four months time in which to put said proposition in final and intelligent form. I cordially endorse the recommendation of the sub-committee and hope it will be agreeable to your commission to consider the same favorably.

In the meantime, if your commission should desire to submit any suggestions or propositions to this commission, looking to the same end, we would gladly and without unnecessary delay, consider the same.

With great respect, I remain,

Yours, etc.,

JOHN W. MASON,
Chairman West Virginia Commission.

HON. J. B. MOON,
Chairman Virginia Debt Commission,
Charlottesville, Virginia.

(Copy)

September 24, 1913.

Judge John W. Mason,
Chairman West Virginia Debt Commission,
Fairmont, West Virginia.

My Dear Sir:

Your favor of the 22d inst., reached me this morning. Last Saturday, the 20th, the Virginia debt commission had a conference with the Attorney General of Virginia, and concluded that under present conditions the only course left open

to us was to press for an order speeding the cause in the Supreme Court, of which the Attorney General of Virginia has, I presume, already notified your Attorney General.

I do not know that this would prevent further negotiations if your commission is in a position to enter into an agreement which would be effective, but no understanding having been reached after you called off our proposed meeting of August 12th, the Virginia commission did not see that there was anything left for them to do except to ask for some final adjudication of any matter which was possibly left open in the last decision of the Supreme Court.

I am sure you will pardon my adverting to the fact that more than two years and a half ago, (March 6th, 1911) the court referred the interest question and any other matter of detailed computation to the two States for their possible agreement and we promptly sent a sub-committee to your State, who returned without being able to accomplish any results.

Our commission therefore felt constrained to ask for some conclusion of the question of interest involved in the controversy and requested our Attorney General to act accordingly, though I do not know that this would preclude an agreement, if one could be arrived at in the premises.

Yours very truly,

JOHN B. MOON.

JBM|CP

Respectfully submitted,

SAMUEL W. WILLIAMS,

Attorney General of Virginia.

FILE COPY.

Office Supreme Court, U. S.
FILED.
OCT 8 1913
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No 2, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR THE BONDHOLDING CREDITORS.

HOLMES CONRAD,
SANFORD ROBINSON,
Counsel for the Bondholding Creditors.

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The West Virginia Commission insisted that the decision of the court should be ignored and the case reopened and considered all over again from the beginning. Nine lawyers on West Virginia's behalf have ably defended this case. All the facts have been brought out and exhaustively considered. Due delineation has been had. The case has taken over seven years. Now the West Virginia Commission asks to begin the case all over again.

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The only effort ever made by West Virginia was in 1871, when she appointed Commissioners to negotiate with Virginia. Virginia had previously made two such offers to West Virginia, which West Virginia did not accept. Virginia then settled her share with her creditors independently, and offered West Virginia an arbitration. West Virginia declined the arbitration and appointed three commissioners to negotiate with Virginia instead. These commissioners found that West Virginia was indebted to Virginia in the sum of $953,360.25. The West Virginia legislature repudiated this finding, and the senate finance committee of 1873 made a report on the debt, which found Virginia to be $525,000 in debt to West Virginia. West Virginia has declined all offers to settle since then and has repeatedly denied all liability.

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West Virginia is liable for interest upon her proportion of the bonds outstanding on January 1, 1861, according to their tenor, by the express terms of her contract contained in section 8 of Article VIII of the Constitution under which she was admitted as a State. This promise in her Constitution was merely the express acknowledgment of an already existing equity arising out of her act of separation from Virginia. This is a Virginia contract, and under the law of Virginia and West Virginia as well West Virginia is liable for interest from January 1, 1861, to date upon the whole of her share. We do not ask so much, but only that she pay the interest to maturity upon her share of the outstanding bonds.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 2, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR THE BONDHOLDING CREDITORS.

This motion seeks to have the court determine the questions left open in the opinion of the court delivered herein by Mr. Justice Holmes on March 6, 1911, and to have the court enter a final decree.

The concluding paragraph of the opinion begins as follows:

> "We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a

> final decree there would be figures to be agreed upon or to be ascertained by reference to a master. Among other things there still remains the question of interest. Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on the other. The circumstances of the asserted default and the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this."

In the following pages we shall try to show the court that West Virginia is liable for interest, and that the time for which she is liable for interest and the rate at which it should be computed are matters as to which there is no controversy in the record. All the facts bearing upon the question of the amount of interest for which West Virginia is liable are contained in paragraph 1 of the master's report and are acquiesced in by West Virginia. All the facts bearing upon the circumstances of West Virginia's default and the conditions sur-

rounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party are admitted by West Virginia, and we shall rely exclusively on West Virginia's admissions in discussing this portion of the case. The result which we reach does not attempt to capitalize charges for half a century, but merely imposes interest according to the tenor of the bonds up to their maturity. We do not ask as much from West Virginia in the way of the performance of her promise to pay her share as Virginia has already done in regard to her proportion. Further delay is useless.

At the recent meeting of the two States at Washington on July 25, 1913, the proposition of Chairman Mason, of the West Virginia Commission, to the Virginia Commission was as follows:

> "It makes no difference which has the first say or which has the last say. We might make it a low figure, practically nothing, and then simply negotiate. It is our idea of procedure" (p. 40).

The first governor of West Virginia in his first message to the first legislature of that State said.

> "The Constitution provides that this State shall assume an equitable proportion of the debt of Virginia, prior to the first day of January, 1861, but no settlement can be made at present, and when it is made our 'equitable proportion' cannot be much" (W. Va. Brief, Jan., 1911, p. 12).

West Virginia's position in regard to the payment of her proportion of the debt is now as it was at the first meeting of her legislature and ever since has been—*not now, but later, and not much then.*

We shall present this subject of vital importance to the bondholding creditors of Virginia, located as they are throughout the world, and waiting over 50 years for realization upon this portion of their property under the following headings: *The Case in This Court; The Proceedings of the Two Commissions at Washington, July* 25, 1913; *The Efforts of West Virginia to Determine and Settle Her Proportion of the Debt; The Efforts of Virginia to Settle the Controversy and West Virginia's Excuses for Failure to Meet Virginia; West Virginia is Liable for Interest; The Amount of Interest Which West Virginia Legally Owes is* $14,055,962.56; *If West Virginia Should Pay Principal and Interest upon Her Proportion of the Debt in the Same Pro Rata Amount Which Virginia Has Paid upon Her Proportion, or if West Virginia Should Scale Both Principal and Interest in the Same Way that the Various Funding Acts of Virginia Provided, or if West Virginia Should Pay Interest for* 34 *Years, as Provided in Her Constitution, the Amount Would be More than the Amount We Ask for.*

Before proceeding to discuss the various points outlined above we wish very respectfully, but very

emphatically, to call the attention of the court to the fact that there is no controversy in the record about the facts which determine the question of interest nor the facts bearing upon the circumstances of the default, the failure earlier to procure a determination of the principal sum payable or the question of laches. These facts are all either admitted by West Virginia or found by the master in his report and acquiesced in by West Virginia. The only question in the case anywhere is as to the legal effect of the already admitted and determined facts.

Point One.

The Case in This Court.

The bill in this suit was filed on leave of the court in February of 1906. The defendant filed a demurrer and later an amended demurrer, and after full argument in March of 1907 Mr. Chief Justice Fuller delivered the unanimous opinion of the court overruling the demurrer. West Virginia filed her answer. The case was again fully argued before this court and on May 4, 1908, a decree was entered referring the cause to a master. West Virginia afterwards asked that the decree of reference be modified in several particulars, and the court acceded to her request in one respect and later on, June 1, 1908, appointed Hon. Charles E.

Littlefield as special master under the decree. He proceeded to take the evidence of the parties at Richmond, Va., between Nov. 16, 1909, and July 2, 1909, and afterwards the parties agreed upon substantially all the accounts taken under the various paragraphs of the decree as appears from the joint exhibits of the parties, all signed by their respective accountants. After that the case was very fully argued before the master in New York city in November and December, 1909, and on March 17, 1910, the master made his report. The case was not heard before this court upon the master's report until January, 1911, and on March 6, 1911, Mr. Justice Holmes delivered the opinion of the court, in which the court gave its decision in respect to the basis of liability and the share of the principal debt of Virginia that West Virginia assumed, but left open among other things the question of interest. Virginia at once sought a conference with West Virginia to determine the question of interest; but West Virginia, although abundant time remained for her governor to insert this matter in a supplementary call to her legislature, which had already been called to meet in special session, declined to take the matter up with Virginia at this time. Thereupon Virginia moved this court on October 9, 1911, to determine the questions left open in the opinion of March 6, 1911, and to enter a final decree. The court denied this application (222 U. S., 17). After the failure of the commissions of the two States to reach any result

at their joint meeting in Washington on July 25, 1913, Virginia again asks this court to proceed with the determination of the questions left open and to enter a final decree. The case is now over 7 years old and the controversy is over 50 years old. There has been no surprise. The case has been fully argued on the demurrer and again on the application to appoint a master and a third time upon the master's report, after taking testimony for a period covering nearly two years, and after both States had agreed upon, and their respective accountants had signed joint accounts under, each paragraph of the decree.

West Virginia has been represented in this case by Hon. John G. Carlisle, Hon. John C. Spooner, ex-Governor Dawson, Prof. Chas. E. Hogg, Mr. W. Mollohan, Mr. Geo. W. McClintic, Mr. W. S. Matthews, and by three Attorney Generals.

West Virginia has had two years and a half to consider the instructions of this court in regard to a joint conference to settle the question of interest. Her proposition at that conference was to begin the discussion of her liability all over again just as if the suit had not been brought and earnestly defended by her for seven years.

> "We might make it a low figure, practically nothing, and then simply negotiate. It is our idea of procedure" (p. 40).

This is the proposition of the West Virginia chairman at Washington.

Point Two.

The Proceedings of the Two Commissions at Washington, July 25, 1913.

The West Virginia legislature at its last regular session adopted a joint resolution on February 21, 1913, which, after reciting that this court had made a finding in this suit that the share of the principal debt of the original Commonwealth of Virginia to be borne by the State of West Virginia was $7,182,607.46, recited further that this court did not fully and finally decide the question involved, but suggested that such proceedings and negotiations should be had between the two States upon all the questions involved in said litigation as might lead to a settlement of the same, and then resolved that a commission of 11 members should be appointed by the governor, which commission was authorized and directed to negotiate with Virginia or her bondholding creditors or their committee and report to the governor, and upon receipt of the report the governor should again convene the legislature for consideration of the same. The governor appointed a commission of 11 members. Hon. John W. Mason, of Fairmont, Va., was chosen as chairman of the commission. The commissions, after correspondence between the governors of the two States, met at Washington on July 25, 1913, but Virginia was unwilling to meet

West Virginia's proposal and West Virginia was unwilling to meet Virginia's proposal, and so on July 26, 1913, the meeting adjourned to meet again at the same place on August 12, 1913. Before this meeting was held, however, it was called off by West Virginia, and no subsequent meeting has since been held.

Virginia took the position at the meeting that, except for arithmetical errors in calculations, the basis of liability of the share of the principal of the debt of Virginia that West Virginia assumed was determined by this court in its decision of March 6, 1911, and she therefore refused to treat with West Virginia in regard to the amount of principal which West Virginia owed. Virginia offered, however, to discuss the question of interest with West Virginia and expressed her willingness to consider any proposition which West Virginia might care to make, either in settlement of the interest or in settlement of the whole debt, principal as well as interest. West Virginia, on the other hand, declined to make any proposition, either in settlement of the interest or of the whole debt, principal and interest, and she insisted upon going into the whole question anew from the beginning just as if this question had not been litigated for the last seven years. The position taken by West Virginia at the joint conference is clearly shown from the following quotations taken from the remarks of Chairman Mason, of West Virginia:

"Chairman MASON, of West Virginia: Referring to the resolutions which have just been presented to us on behalf of the Commission of Virginia, I would say for the Commission of West Virginia that it was not our expectation that this conference was to be confined to the consideration of only the question of interest. Our idea had been that the scope of the conference would be wider, and that we would confer together and take up the whole case, principal and interest. We thought that was what we were to meet here for.

"It is my understanding that we, as commissioners representing the two States, have the power to ascertain what is West Virginia's equitable proportion of the debt, if anything" (p. 14).

* * * * * * *

"Let me say a word as to another matter, if you will indulge a personal allusion. I am one of the men who voted for that Constitution. I am one of the men who made that promise. It was my first vote. We made that promise. I, for one, have never had any inclination to, nor never thought of retracting it. But, for fifty years we have been asking, clamoring and demanding, trying in every way we knew how to get at the question of what is our equitable proportion of that debt" (p. 26).

* * * * * * *

"Mr. MASON: If you mean by that, gentlemen, to get down to the concrete and say 'West Virginia will pay you so much money' or, 'Virginia owes us so much money?' as to that we already have had two statements of that account in West Vir-

ginia. One statement brings West Virginia out a little in debt. The gentlemen who made that statement, the principal man who made that report, was the old auditor of Virginia for eight years. Since that report there is another statement which says you owe us" (p. 28).

* * * * * * *

"Chairman MOON, of Virginia: What do we understand by 'the whole matter'?

"Chairman MASON, of West Virginia: Interest and all; everything to go to the subcommittee; and let it thresh it out, and let it make its report.

"Mr. HARRISON, of Virginia: You mean to reopen the whole case and consider the questions *de novo*. That is what you mean by 'the whole matter,' I suppose?

"Chairman MASON, of West Virginia: That is our view" (p. 39).

* * * * * * *

"We might make it a low figure, practically nothing, and then simply negotiate. It is our idea of procedure" (p. 40).

* * * * * * *

"Chairman MASON, of West Virginia: I say, the amount of the principal. We do not look at it that way. We want the whole matter to be taken up by the subcommittees, to see just what we ought to pay, if anything" (p. 41).

* * * * * * *

"Mr. HARRISON, of Virginia: You mean, by 'the whole subject-matter,' to reopen the whole case and consider the matters *de novo*.

"Chairman MASON, of West Virginia: Yes sir, that is as far as the commissions are concerned" (p. 41).

From the foregoing it appears that West Virginia was not prepared to make or receive any proposition in settlement of the interest due or in settlement of the amount due, principal and interest, and was only willing to deal with Virginia upon the basis that the whole controversy should open anew from the beginning and all the proceedings in this case should go for nothing.

The attitude taken by West Virginia at the joint conference is not a new one. Her position, as stated by her chairman, is as follows:

> "We might make it a low figure, practically nothing, and then simply negotiate. It is our idea of procedure."

West Virginia's brief, upon the final hearing of this case after the master's report, at page 12 contains the quotation from the first governor of West Virginia in his first message to the first legislature of that State, which we also have quoted above. The governor said:

> "No settlement can be made at present, and when it is made our 'equitable proportion' cannot be much."

A West Virginia committee, appointed in 1871, reported that West Virginia's share of the debt was $953,360.23, but her legislature was unwilling to bind the State for even this modest amount of liability and repudiated the report. The Senate Finance Committee of 1873 made a report instead,

in which Virginia was found indebted to West Virginia in the sum of $525,000. These were the two reports on the debt to which Chairman Mason referred in his remarks quoted above.

Each legislature of West Virginia, from 1895 to 1905, inclusive, resolved that West Virginia owed nothing on account of the debt. Most of the resolutions added that West Virginia was unalterably opposed to any negotiations on the subject. We shall discuss these matters more particularly in our next point, but have referred to them here for the purpose of showing that the position assumed by West Virginia at the joint conference was not a new position, but the attitude she has taken throughout whenever the question of her liability for this debt has been called to her attention.

The West Virginia view,

> "No settlement can be made at present, and when it is made our 'equitable proportion' cannot be much,"

is as old as West Virginia herself. It is older. This conception of liability in West Virginia antedates the birth of the State itself. As long ago as the Constitutional Convention of Virginia of 1829-30, Mr. Alexander Campbell, remarking about it, measured West Virginia's liability in terms which have since become the Wheeling ordinance and which were intended to make West Virginia's share of the debt as remote, as shadowy, and as small as calculation could make it.

West Virginia is wrong about the question of the debt. She has told herself so many times that she does not owe anything that she has come to believe that she does not owe anything. Few of her citizens have yet had the courage to tell West Virginia the truth. When this court finally fixes the amount due from West Virginia and enters its decree to that effect we all know that the good people of West Virginia will at once proceed to comply with the conditions of the decree.

As long ago as 1873 West Virginia recognized the right of Virginia to determine this question in this court (Report of the Senate Finance Committee of 1873, W. Va. Comp., vol. 1, p. 491).

Hon. John W. Mason, the present chairman of the West Virginia Commission, in a letter dated May 29, 1908, to Governor Dawson, of West Virginia, in regard to the debt, wrote in part as follows:

> "We hear much talk about compromise and settlement out of court. All lawsuits arising out of controversies of this character are simply involuntary arbitration, and I know of no body of men to whom this controversy can be submitted with such confident assurance that it will be fairly, properly and justly settled, as to the Supreme Court of the United States"(W. Va. Comp., vol. 2, p. 383).

It is obvious from the foregoing that the ideas of the people of Virginia and West Virginia are radically different about the amount which West

ginia should pay to the old creditors of Vir-
a, and that no amount of mere time will bring
n any nearer in their views. The attitude of
st Virginia today is the attitude of West Vir-
ia 47 years ago, and the attitude of the people
) then lived in the present boundaries of Vir-
ia 80 years ago.

Point Three.

e Efforts of West Virginia to Settle and Deter-mine Her Proportion of the Debt.

All the facts bearing upon this point of our brief
admitted by West Virginia. These admissions
contained in the Appendix of the West Vir-
ia Compilation, vol. 1, pp. 444-472, inclusive,
l 490-496, inclusive, in paragraph XI of her
swer, and in pages 12-20, inclusive, of West Vir-
ia's Brief on the final hearing of this case after
e master's report. The extracts from West Vir-
ia's Appendix and Answer and Brief are
inted at the end of this brief as Schedules 1, 2,
d 3.

From these admissions by West Virginia it ap-
ars that the first effort made by West Virginia
determine her proportion of the debt was the
pointment of a committee of three men, known
the West Virginia Debt Commissioners of 1871.
ie resolutions of the West Virginia Legislature,

upon which the then Governor Jacobs appointed Messrs. Bennett, Cambell, and Jackson as commissioners, are found at pages 453-454 of the West Virginia Compilation, vol. 1, and their report appears on pages 457-489. It appears therefrom and from the proceedings as stated in the appendix that Virginia on several occasions prior to 1871 tried to induce West Virginia to appoint commissioners to treat directly with her commissioners, and that West Virginia having always refused to do so the Virginia legislature, on February 11, 1871, adopted resolutions providing for the settlement of the controversy by arbitration. Owing to the fact that Virginia had provided for the settlement of the controversy by arbitration, the Governor of Virginia declined to appoint commissioners to treat with West Virginia, but these commissioners of West Virginia proceeded to Richmond on an independent *ex parte* investigation of their own, and they found West Virginia's share of the Virginia debt to be $953,360.28. These commissioners felt themselves aggrieved because of the letter they received from the Second Auditor of Virginia, and because of a reference to West Virginia's attitude contained in Governor Walker's message to the General Assembly of Virginia at the time. This letter of the Second Auditor and this extract from the message of the then Governor of Virginia have ever since been used by West Virginia as excuses for her subsequent conduct. We quote them here:

"In reply to the foregoing communication we received the following note at 5 o'clock on the evening of the 16th of November, after a lapse of two and a half days, and after we had abandoned all hope of the assistance asked for in our letter, and after, in fact, we were on the eve of our departure for home:

"SECOND AUDITOR'S OFFICE,
"RICHMOND, *Nov.* 16, 1871.

"A. W. CAMBELL, Esq.,
Secretary, &c.

"DEAR SIR: Yours of the 14th was received. You ask me for a report upon a variety of questions connected with our public debt, the transactions of the Board of Public Works in regard to it, and the financial affairs of the State, which it is understood of course you propose to use in the contemplated adjustment of the portion to be paid by West Virginia of the debt.

"To answer the questions propounded would involve an amount of labor which we could not bestow on the subject.

"But, apart from this, I presume at an early day this office will be called upon by the Executive or the General Assembly of Virginia for detailed reports of all the matters referred to, which will be available to you.

"The books and records of this office are open to your inspection.

"I trust that in failing to respond to your inquiries you will not regard me as in any wise wanting in official courtesy to you or

your associates. None, certainly, is intended.

"I have the honor to be,

"Most respectfully yours,

"ASA ROGERS."

* * * * * * *

"Now, if the authorities of West Virginia entertained an earnest desire to make a speedy and final settlement of this matter, why did they not accept our tender of arbitration? A mode of settlement of such controversies universally recognized by both nations and individuals as right and appropriate. Suppose an equal number of Commissioners appointed by each State, and that they should meet and disagree upon any or all points involved, who is to decide between them? And yet, beyond a doubt, they would radically disagree upon the first or chief point to be settled, viz: the basis or principle upon which the settlement should be made. But, suppose that the Commissioners should finally agree, does any one suppose that their finding would be ratified by the legislatures of the two States, disagreeing as the people do radically upon the merits of the question at issue? Of course not" (W. Va. Comp., vol. 1, pp. 461, 462, 463).

It must be borne in mind that Virginia had offered in 1867 and again in 1870 to settle directly with West Virginia her proportion of the debt through Commissioners and that West Virginia having declined both offers, Virginia had gone ahead and settled her proportion of the debt with

her creditors on a basis satisfactory to the creditors and had proposed arbitration to West Virginia. What genuine exception can be taken to the letter of the Second Auditor or to this extract from Governor Walker's message. The letter was fair and the message was true.

The West Virginia Commissioners criticized Virginia for settling with her creditors without West Virginia; for fixing her share at two-thirds, and for compounding interest on the debt. They criticized Virginia for paying only two-thirds of her debt as too small a proportion and then for compounding the interest as making that proportion too large (W. Va. Comp., p. 464). In paragraph XII of her answer, West Virginia again makes the same complaint.

It seems to us a praiseworthy instead of a blameworthy thing, that Virginia so early settled with her creditors upon a basis satisfactory to them, and if Virginia compounded the interest in a high sense of her obligation to her creditors it is all the more praiseworthy. Certainly her creditors much preferred Virginia settling with them in 1871 to an indefinite postponement until such time as West Virginia should join in the settlement.

The Senate Finance Committee of West Virginia made a report in 1873, to which we have already alluded, finding Virginia indebted to West Virginia in the sum of $525,000.00. This report pointed out to Virginia that she could sue West Virginia in the Supreme Court of the United

States. When Virginia adopted that process as the only way left to her to obtain a settlement of this controversy, West Virginia shifted her position again and disputed the jurisdiction of the court. After 1873 West Virginia took no notice of her proportion of the debt until the meeting of her legislature in 1895.

That Legislature of West Virginia resolved that it declined to enter into any negotiations with the debt commission appointed by Virginia in 1894 to settle the Virginia debt, and since then each successive Legislature of West Virginia down to and including the session of 1905, just prior to the beginning of this suit has resolved that West Virginia owes no part of the Virginia debt, and that her legislature is opposed to any negotiations in regard thereto (W. Va. Comp., vol. 1, pp. 494, 495).

Chairman Mason, in his remarks at the joint conference at Washington, said as quoted above:

> "But, for fifty years we have been asking, clamoring, and demanding, trying in every way we knew how, to get at the question of what is our equitable proportion of that debt" (p. 26).

In the ten years from 1895 to 1905 each West Virginia Legislature resolved that she owed no part of the debt and was opposed to any negotiations on the subject.

In the twenty-two years from 1873 to 1895, West Virginia was silent. Prior to 1871 she refused to

neet Virginia, using as an excuse the pendency of he suit in this court, brought by Virginia to re- over the counties of Berkeley and Jefferson.

In 1871 West Virginia did appoint commis- sioners, but the finding of this commission that West Virginia owed less than $1,000,000, was repu- diated at once, and in 1873 the Senate Finance Committee reported that Virginia was indebted to West Virginia in the sum of $525,000. This re- port was made an exhibit in West Virginia's an- swer. The letter of the Second Auditor of Vir- ginia, and the extract from message of Governor Walker to Virginia are given as excuses for the subsequent conduct of West Virginia. We have laid them both before the court to see if it finds in either of them an excuse for West Virginia's course.

We have now given all the efforts made by West Virginia from her beginning to the present time to procure a determination of her share of the debt. We do not find anything therein to excuse West Virginia from liability for the amount of interest which we shall later on in the brief show she legally owes.

Point Four.

The Efforts of Virginia to Settle the Controversy and West Virginia's Excuses for Failure to Meet Virginia.

West Virginia's admission of the facts bearing upon this portion of our argument are contained in the same papers to which we referred in our previous point and are pages 444-472, inclusive, and 490-496, inclusive, of West Virginia's Appendix to the West Virginia's Compilation, vol. I, and paragraph XI of her Answer, and pages 12-20, inclusive, of her Brief upon the hearing after the Master's report. They are printed at the back of this brief as Schedules 1, 2, and 3.

During a period of forty-five years, from January 20, 1867, down to May 2, 1911, repeated efforts were made by Virginia to induce West Virginia to enter upon a settlement, all of which were without avail. Six conspicuous efforts on the part of Virginia to bring about a settlement may be more particularly referred to.

These six efforts were as follows:

Governor F. H. Pierpont, of Virginia, sent a communication to Governor Arthur I. Boreman, of West Virginia, dated January 20, 1867, together with a joint resolution adopted by the General Assembly of Virginia on February 28, 1866, in reference to the reunion of the States of Vir-

ginia and West Virginia and the adjustment of the public debt, and appointing Mr. A. H. H. Stewart, Mr. William Martin, and Mr. John Janny as commissioners to proceed to the seat of government of West Virginia, and giving them authority to treat with the authorities of West Virginia on both subjects.

On February 28, 1867, the Legislature of West Virginia adopted a joint resolution declining to entertain any proposition looking to a reunion of the States, and refusing to treat with the Commissioners of Virginia upon the adjustment of the public debt of Virginia until the suit of Virginia against West Virginia to recover jurisdiction over the counties of Berkeley and Jefferson had been finally disposed of (W. Va. Comp., vol. I, pp. 444-445).

Governor Gilbert C. Walker, of Virginia, sent another communication to Governor William E. Stephenson, of West Virginia, in February, 1870, endeavoring to adjust the Virginia public debt with the State of West Virginia, and about the same time Messrs. William J. Robertson, W. T. Sutherlin, and P. H. Aylett, commissioners, appointed on the part of Virginia, also sent a communication to Governor Stephenson. The first communication was transmitted by Governor Stephenson to the West Virginia Legislature on February 24, 1870, and the second communication was so transmitted on February 28, 1870.

It appears from the joint resolution adopted by

the Legislature of West Virginia after the receipt of Governor Stephenson's communication that the Virginia commissioners were then present in the city of Wheeling for the purpose of adjusting the public debt. The West Virginia Legislature appointed a committee to confer with the Virginia commissioners and report to the legislature, but as far as the journals of the House and Senate of West Virginia of the session of 1870 show no report was made by this committee (W. Va. Comp., vol. I, pp. 446-447).

The defendant's answer states that afterwards, on March 3, 1870, the Governor of West Virginia was authorized by the legislature to appoint three resident citizens of the State to treat with the authorities of Virginia upon the subject of the proper adjustment of the public debt of that State, but as there was an omission to make an appropriation to pay the expenses of West Virginia's commissioners, and the resolution authorizing their appointment was passed on the last day of the session of the legislature, the Governor of West Virginia stated in his message of 1871 that no appointment had been made owing to the lack of funds to pay the expenses of such commission (Record, pp. 151, 152).

On February 17, 1871, Governor Walker, of Virginia, sent another written communication to Governor Stephenson, of West Virginia, offering to adjust West Virginia's proportion of the public debt of Virginia by arbitration in accordance

with a joint resolution of the General Assembly of Virginia approved on February 11, 1871 (W. Va. Comp., vol. I, pp. 449-451), but West Virginia declined this offer (W. Va. Comp., pp. 452-454).

In February, 1895, Governor O'Farrell, of Virginia, communicated to Governor McKorkle, of West Virginia, a copy of the resolution adopted by Virginia March 6, 1894, appointing commissioners for the purpose of negotiating with West Virginia for the payment of the proportion of the Virginia public debt to be borne by West Virginia, but no response was ever made by West Virginia, although her legislature declined to negotiate with Virginia (W. Va. Comp., pp. 76 and 494).

On February 1, 1905, Mr. Randolph Harrison on behalf of the Virginia Debt Commission, addressed the joint committees on finance of the West Virginia Legislature in relation to West Virginia's contributive share of the debt of Virginia (W. Va. Comp., pp. 68-82), and as West Virginia was still unwilling to treat with Virginia this suit was begun. The last attempt of Virginia to treat with West Virginia is set forth in the motion papers on the motion of October 9, 1911, herein to proceed with the determination of the suit.

The only effort made by West Virginia at any time to settle this debt was made through a committee consisting of Messrs. John J. Jackson, J. M. Bennett, and A. W. Campbell, appointed by Governor J. J. Jacob, of West Virginia, under resolutions adopted by the West Virginia Legislature on

February 15 and February 24, 1871. These gentlemen sent a letter to Governor Walker of Virginia notifying him of their appointment and inquiring what channel of communication with Virginia was open to them. Governor Walker replied that the joint resolution of Virginia providing for arbitration had superseded the joint resolution of February 18, 1870, authorizing the Governor to appoint commissioners, and for that reason that he could not appoint commissioners to confer with West Virginia.

He said that the tender of arbitration had not been withdrawn and was still open (W. Va. Comp., pp. 457-459). These commissioners of West Virginia then proceeded to determine for themselves the balance due Virginia from West Virginia, and found the amount to be $953,360.23 (W. Va. Comp., p. 472); but this determination was not satisfactory to the State of West Virginia, and the Senate Finance Committee of the West Virginia Legislature, on December 22, 1873, made a report to the effect that the State of West Virginia was not liable for any part of the debt of the undivided Commonwealth of Virginia, but that the State of Virginia was indebted to the State of West Virginia in the sum of $525,000.00 (W. Va. Comp., pp. 490-493). Ever since that time West Virginia has taken the position that she does not owe any portion of the debt of the undivided Commonwealth of Virginia and that she would not enter into any negotiations looking to the settlement of

the Virginia debt question. West Virginia's Legislature has repeatedly adopted resolutions denying that West Virginia owed any part of the so-called Virginia debt, and that her legislature was opposed to any negotiation whatsover on that subjest (W. Va. Comp., pp. 494-496).

The last visit of the representatives of Virginia to West Virginia with reference to the settlement of the debt took place on May 2, 1911, and subsequent to the time of the filing of the defendant's answer, but the other efforts of Virginia to settle this debt and the refusals of West Virginia to do anything with reference to a settlement are virtually admitted in the defendant's answer in paragraph XI thereof.

It appears from the foregoing that Virginia on five separate occasions, in the years 1867, 1870, 1871, 1895, and 1905, tried to amicably settle this controversy, and, these repeated efforts having failed, that Virginia brought this suit in February, 1906, and in accordance with the decision herein, dated March 6, 1911, that she again endeavored to meet West Virginia, and it also appears that the only time West Virginia was willing in any way to discuss with Virginia the settlement of the debt was in 1871, when West Virginia appointed commissioners to treat directly with Virginia at a time when the General Assembly of Virginia had adopted a resolution providing for the settlement of the controversy by arbitration. It also appears that the findings of this committee fixing West

Virginia's share in even the small sum of about $1,000,000 were repudiated by the West Virginia Legislature of 1873, and that from that time down to the present West Virginia has continually refused to treat with Virginia in any way for the settlement of this controversy. West Virginia is willing to talk now, on condition that her liability is put at practically nothing, and that the decision in the case be ignored; but that is all she is willing to do.

West Virginia's excuse for failure to meet Virginia in 1867 was the pendency of the suit in this court in regard to the counties of Berkeley and Jefferson. The Governor of West Virginia was authorized to appoint commissioners to meet Virginia's commissioners in 1870, but he made no appointment because the legislature had failed to appropriate money to pay the expenses of such commission. Virginia's tender of arbitration in 1871 was declined, so West Virginia said, because West Virginia soon afterward appointed commissioners to treat with Virginia directly. West Virginia made no response to Virginia's offer in 1895, but her legislature declined to negotiate with Virginia and passed the following resolution:

"House Joint Resolution No. 10, Concerning the Virginia Debt.

"(Adopted February 7th, 1895.)

"*Resolved by the Legislature of West Virginia,* That this legislature hereby de-

clines to enter into any negotiations with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution."

West Virginia's answer to Virginia's offer in 1905 was the following resolution:

"(H. J. R. No. 7.)

"Joint Resolution No. 3.

"(Adopted January 20, 1905.)

"Relating to the Virginia Debt.

"*Resolved by the Legislature of West Virginia*, That it is the sense of this legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject."

Counsel for West Virginia have attempted to justify West Virginia's refusal to meet Virginia in 1895 and again in 1905 because the resolution of the Virginia Legislature creating the Virginia Commission provided that the commission should not enter into any negotiations thereunder except upon the basis that Virginia is bound only for two-

thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof. An argument was based upon this provision that any negotiations conducted by the Virginia Commission must necessarily assume West Virginia's proportion to be one-third and that of course she was unwilling to negotiate on this basis.

The provision in the act referred to above was an arrangement between Virginia and her creditors. In 1871 Virginia assumed two-thirds of the debt and at once compounded and capitalized all the past-due interest on this portion. The load was more than she could bear and finally, in 1892, she made a final and satisfactory settlement with her creditors. Of course Virginia did not propose to reopen this question. She had, up to 1906, paid out various sums amounting to upwards of $70,000,000 in payment of her proportion of the debt. It was perfectly right that she should stipulate with her creditors that the amount of her liability was already fixed and determined, as in fact it was. There is not the slightest excuse for assuming that the act of 1894, creating the Virginia Commission, or the act of 1900, authorizing this suit, in the slightest degree attempted to fix West Virginia's liability in advance as one-third or to predetermine it to any extent. West Virginia's amount was left open to be determined by negotiation between the parties, and the excuses of counsel, are empty and without meaning. This is espe-

cially true when read in the light of the resolution of West Virginia's Legislature of 1895 and also 1905.

Chairman Mason, in his remarks before the joint conference at Washington, which we have quoted above and shall repeat here, said:

> "But for fifty years, we have been asking, clamoring, and demanding, trying in every way we knew how to get at the question of what is our equitable proportion of that debt" (p. 26).

We do not agree with Chairman Mason. We have stated the facts. We think they show that West Virginia for fifty years has been trying in every way she knew how to avoid the question of what is her proportion of the debt.

Point Five.

West Virginia is Liable for Interest.

The court has held this is a suit on a contract.

It is in fact a suit for the specific performance of a contract made for the benefit of a third party. The contract is set forth in section 8, Article VIII, of the West Virginia Constitution, upon which West Virginia was admitted into the Union. It is as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia

> prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

West Virginia is liable for interest by the express terms of this paragraph. Of course, as it is West Virginia that is speaking, the clause will be construed most strictly against that State. What was the public debt of the Commonwealth of Virginia prior to the first day of January, 1861? The court has already determined that it consisted almost wholly of interest-bearing bonds and the balance of the debt was accrued interest on those same bonds. If the accrued interest prior to the first day of January, 1861, was a portion of the public debt, how is it possible to say that the accruing interest was not. We are willing to accept for the purpose of this argument, as a settled rule of law, that a State is not bound to pay interest unless she promises to do so.

The court has made it very plain that this promise of West Virginia, contained in her constitution, is only the expressed recognition of a deep-seated equity for which she was already liable and by which she was already bound. The court, in its decision of March 6, 1911, said as follows:

> "The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the

unilateral attempt of Virginia to apportion specific parts to the two States."

If there had been no promise in and no contract made by West Virginia's Constitution, West Virginia would have been just as liable for her equitable proportion of the debt as she is, having made that expressed promise. It will not bear the light of reason to say that, as to Virginia's share, after the dismemberment of the old State, the bondholding creditors of the old State would be entitled to receive interest upon the bonds according to their tenor; but upon West Virginia's proportion thereof, the same creditors holding the same bonds would not be entitled to receive their interest. The equitable obligation falling upon each State to pay its share of the undivided debt is contractual and not tortious. West Virginia is just as liable for her share of these bonds according to the tenor of the bonds as Virginia is liable for her proportion. The fact that West Virginia acknowledged her liability in her constitution, and promised to Virginia to discharge that liability, while it adds another form to West Virginia's obligation does not change the substance of that obligation. It certainly does not change the substance of that obligation to diminish it. Suppose West Virginia, for a sufficient consideration, had assumed the whole debt, would she be heard to say that, while she was liable for the principal of the bonds, the interest upon them, according to their tenor, was

not for her to pay. She proposed, in section 8, Article VIII, which we have discussed, to provide a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years. This shows that both West Virginia and Virginia had in mind, and that Congress had in mind, her liability for the interest as well as for the principal of her share. Suppose when the admission of West Virginia as a State was before Congress, and this clause of her constitution was under consideration, the clause read, "We propose to be liable for the principal of our proportion of the bonds, but we won't pay any interest accruing on our share of the debt until our legislature has ascertained what our proportion of the debt is," West Virginia would not have been admitted as a State. West Virginia is liable for her share exactly as Virginia is liable on her share of the bonds according to their tenor. This clause of her constitution will not bear any other construction. The debt is an interest-bearing debt and West Virginia is liable for it, including all its incidents, as it existed prior to January 1, 1861. West Virginia concedes that she is liable for the accrued interest. There is no term which determines the liability for interest which had accrued, different or additional to the terms which fix the interest to accrue after January 1, 1861. Suppose I give my promissory note to X for $1,000, payable in one year, with interest at 6 per cent; in six months from now Y comes along and assumes my obligation. Does not Y by

hat act contract to pay the accruing interest just as much as he contracts to pay the interest which has accrued? In this respect West Virginia is no different from any individual. What we are seeking to determine is the nature of West Virginia's promise. Whatever way we look at it we are forced to the conclusion that her promise is to assume the obligation as it existed. This was an obligation for interest as well as for principal. The question of whether a State is liable for interest except where she expressly promises to pay it does not arise because West Virginia promised. We concede that a State is not chargeable with interest for failure to meet an obligation when due where interest would be imposed as damages against her for her failure to perform her promise. Only *ex contractu* obligations of a State are enforced in this court.

United States *vs.* North Carolina, 136 U. S., 211.

South Dakota *vs.* North Carolina, 192 U. S., 286.

In this case our right to interest is based upon West Virginia's promise to pay it.

In the brief filed on behalf of Virginia upon the argument on the merits after the master's report, West Virginia's liability for interest was very fully discussed (Va.'s Brief, pp. 94-97), and it was there shown to be the law of Virginia that interest is incident to the obligation and, even though not expressed in the contract, is an inherent part of it.

"Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.

"In Jones *vs.* Williams, 2 Call, 106, decided in 1799, Edmund Pendleton, who was one of the great judges of our country, delivering the opinion of the court said:

> "Interest is allowed because it is natural justice that he who has the use of another's money should pay interest for it."

"Cited with approval in Baker *vs.* Morris, 10 Lehigh, 284; McVeigh *vs.* Howard, 87 Va., 599, and Stuart *vs.* Hurt, 88 Va., 343.

"In Hatcher *vs.* Lewis, 4 Randolph, 152, 147, the court laid down the rules in the following expressive language:

> "*The interest follows the principal as the shadow does the substance.*"

"In Chapman *vs.* Shepherd, the court said:

> "In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse."
>
> Chapman *vs.* Shepherd, 24 Gratt., 377, 384.
>
> Roberts *vs.* Cocke, 28 Gratt., 207.
>
> Tidball *vs.* Shenandoah National Bank, 100 Va., 741.

"Interest is favored both by the legislative and judicial bodies of the State."

Tazewell *vs.* Saunders, 13 Gratt., 354, 370.

"In McVeigh *vs.* Howard, 87 Va., 599, the Supreme Court of Appeals of Virginia said:

"It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals."

* * *

"Citing Jones *vs.* Wiliams and Hatcher *vs.* Lewis, quoted above.

"Such is the law of Virginia as to interest. "*The law of West Virginia in regard thereto is the same.*

"In Shipman *vs.* Bailey, 20 W. Va., 140, 146, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

"Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the

contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

"That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

"In Pickins *vs.* McCoy, 24 West Va., 344-352, the court affirms Shipman *vs.* Bailey, and adopts the language just quoted from that decision.

"Independently of these West Virginia decisions, such parts of the common law and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of article XI of the first West Virginia Constitution. And see present West Virginia Constitution.

"The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

"As a part of this body of laws, the law of Virginia as to interest became, and has continued to be, a part of the laws of West Virginia.

"Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidence by the public acts of Virginia and West Virginia set forth in complainant's bill.

"*This is the rule in Virginia as to debts due by the Commonwealth.*

"The question was presented in the celebrated case of Higginbotham's Executrix *vs.* Commonwealth, 25 Gratt., 627.

"That was a suit against the Commonwealth to recover the amount due Higginbotham's Executrix on certain past due dividends on stocks which had been guaranteed and assumed by Virginia by the acts cited in the opinion of the court—26 Gratt., 630, 631.

"There was no express contract by the State to pay interest upon said dividends. The petitioner's claim was for the amount of the dividends 'with its accruing interest.'

"The unanimous decision of the Supreme Court of Virginia was that 'judgment should be entered for the petitioner for the amount of her demand with interest' (*Idem,* p. 641).

(Va.'s Brief, pp. 94-97.)

North Carolina was not held liable for interest which she did not expressly promise to pay. In that State interest, unless expressly promised, is not an inherent term of the contract, but is im-

posed as damages for failure to keep the promise. If by the law of North Carolina the State was charged with interest, whether she expressly promised it or not, the decisions in the above cases would have been otherwise. Under the cases quoted above from the brief of Virginia, West Virginia is liable for interest upon her share of the debt down to the present time even if she had not expressly promised to pay it. If West Virginia had made no express promise about her debt we feel that under the law as laid down in the foregoing cases taken from Virginia's brief West Virginia would be liable for interest from January 1, 1861, up to the present time. *But we do not ask so much.*

It seems to us that West Virginia's liability for interest rests upon her promise in her Constitution; recognizing the deep-seated equity imposed by her action of separation; to pay her proportion of the debt, principal and interest, to the date of maturity of the various bonds according to their tenor. We shall now proceed to show the amount of that liability.

Point Six.

The amount of interest which West Virginia legally owes is $14,055,962.56.

This interest is computed upon West Virginia's share of the bonds outstanding January 1, 1861,

according to their tenor. All the facts and figures upon which the computation is made are found in paragraph 1 of the report of the special master, and these facts and figures are acquiesced in by West Virginia.

We have shown in the previous point that under the law of Virginia, and West Virginia as well,

> "Interest follows the principal as the shadow does the substance."

Interest, where not expressly promised, is not imposed in Virginia and West Virginia as damages awarded by the court against the party who fails to fulfill his promise, but is an inherent term of every contract. Every one in Virginia who makes a promise to pay a sum certain or which can be determined after an accounting or otherwise, also promises, by the inherent terms of the contract, to pay interest up to final payment of the obligation from the time it is created, irrespective of when or how the amount of obligation is definitely determined. We have shown that this same rule prevails against the Commonwealth of Virginia itself. Inasmuch as this is a Virginia contract it is to be construed by the laws of Virginia. These facts distinguish the present case from—

United States *vs.* North Carolina, 136 U. S., 211.

South Dakota *vs.* North Carolina, 192 U. S., 286,

cited above. North Carolina was not subjected to the payment of interest after the maturity of her promise in either of these cases because, in North Carolina, interest against an individual is imposed as damages and not as an inherent part of the obligation. Damages are never awarded against a State, and so North Carolina was relieved from interest after maturity upon her obligations. In United States *vs.* North Carolina (*supra*) the court indicated that the case would be otherwise if the law in North Carolina were as it is in some of the other States and as it is here shown to be in Virginia and West Virginia. If interest, even though not expressly mentioned, is an inherent term of the contract, West Virginia is liable for interest as she is for every other term in the contract.

This application of the law, however, imposes a heavy burden on West Virginia. Interest for fifty years amounts to 300 per cent, and West Virginia's total liability on this basis would be nearly $30,000,000. The court, in its opinion, has pointed out that it would be a severe result to capitalize charges against West Virginia for half a century. That is true. States as well as individuals have made and will continue to make mistakes, and for these mistakes they must pay. The men who made this country of ours built a constitution which has survived and will continue to live in spite of what from time to time looks like sure destruction at the hands of the then current public opinion which

must periodically burst forth in the evolution and progress of our country. The Constitution makers provided for the settlement of disputes between States by "involuntary arbitration." This phrase does not belong to us. It was used by Hon. John W. Mason, chairman of the present West Virginia Debt Commission, in a letter dated May 29, 1908, to Governor Dawson, of West Virginia (W. Va. Comp., vol. II, p. 383). It is very hard upon West Virginia today that her people must keep the promise which they made over fifty years ago in order to secure their political birth into a State of this Union. The hardship upon them of paying their honest debt, however, is probably immeasurably small compared to the hardship that would have fallen upon the people of West Virginia if our constitution had not provided for this method of "involuntary arbitration."

We have already pointed out in this brief that nothing that Virginia or West Virginia has done or failed to do entitles West Virginia to be relieved from the legal consequences of her failure to perform this solemn promise which was a necessary condition precedent to her creation as a State. Certainly no act or omission of the bondholders should relieve her. They have asked West Virginia to pay, and her answer to them was "No," just as her answer to Virginia was "No."

We do not ask for a Shylock application of the law. Undoubtedly many people in West Virginia honestly believe that West Virginia is not a de-

faulting debtor State. No one can read the remarks of the special master in this case at the beginning of paragraph 3 of his report without seeing that the Wheeling ordinance is not predicated upon the amount of the debt, and that the just proportion which it purported to determine would be the same irrespective of the size of the debt. "Just proportion and equitable proportion," from the time of the creation of West Virginia and for thirty years prior, originally meant "cannot be much." Since 1873, in West Virginia, "just proportion" and "equitable proportion" have meant no liability whatever. The report of the Senate Finance Committee of that year crystallized West Virginia repudiation. This has been repeated so often in West Virginia that many of her people have come to believe it is true.

Therefore, and because of the admonition of this court, and notwithstanding the rule of construction that section 8 of article VIII of West Virginia's Constitution should be construed most strictly against West Virginia and in favor of Virginia and her bondholding creditors for whose benefit the contract was made, we do not ask this court to impose the utmost liability for interest on West Virginia, but merely that West Virginia pay interest upon her proportion of the bonds according to their tenor.

All of the bonds are listed in paragraph 1 of the master's report, which follows paragraph 1 of the decree and reports:

"The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness."

These facts and figures found by the master are acquiesced in by West Virginia. An examination of the table in paragraph 1 shows that many of these bonds are redeemable at the pleasure of the General Assembly and draw interest until redeemed.

The 6 per cent registered bonds redeemable at the pleasure of the General Assembly, outstanding in the hands of the public, after deducting all bonds held by the Board of Public Works, the literary fund and the sinking fund amount to $8,957,271.03 and West Virginia's proportion thereof is $1,898,941.46.

The 5 per cent bonds redeemable at the pleasure of the General Assembly outstanding in the hands of the public, after deducting all bonds held by the Board of Public Works, the literary fund and the sinking fund of Virginia amount to $262,000.00 and West Virginia's proportion thereof amounts to $55,544.00.

The James River stock annuity shown in the Master's report to amount to $95,500.00, in the hands of the public, after deducting all bonds held by the Board of Public Works, and the literary

fund and the sinking fund of Virginia, was not evidenced by any form of certificate of debt, prior to January 1, 1861, but that figure is the principal amount required to produce annually at 6 per cent the sum guaranteed forever to the stockholders of the James River Company, and this treatment of the annuity was approved by West Virginia's accountant in joint Exhibit A1 and acquiesced in by West Virginia. West Virginia's proportion of this annuity is $20,246.00.

We have annexed to our brief as Schedule 4 thereof the computation of interest upon West Virginia's share of the bonds. For this purpose the bonds are collected in eight groups. The 6 per cent and 5 per cent registered bonds, redeemable at the pleasure of the General Assembly, and the James River stock annuity comprise groups 1, 2, and 3, respectively. West Virginia's share of the bonds in these three groups amounts to $1,974,731.46, being much less than one-third of the total principal for which she is liable. The court has pointed out in its opinion that no portion of the debt is extinguished, and there is no reason why on this proportion of West Virginia's share she should not pay interest to date. On any basis of computation she is legally bound to do so. This is off-set by the fact that in the case of the remainder of her share she does not pay interest at all on some of the bonds and on the others pays interest to periods which end from 1886 to 1894. Where the Virginia bonds were not redeemable at the pleas-

ure of the General Assembly; but had a definite maturity date; the Master put in his report as the date of the bonds the date of the act under which they were authorized. This, of course, greatly benefited West Virginia because it moved backwards the maturity date of the bonds by a period of time equal to the time between the passage of the act authorizing the issue and the date when the respective bonds under that issue were sold. Virginia did not object to this, for while it considerably reduced the amount of interest due by the method here adopted it tended to simplify the case and reduce the number of items to be considered by the Master and the court.

The bonds in group 4 were created under an act of March 16, 1838, and were redeemable in twenty years, so no interest is charged upon West Virginia's share of this group.

The bonds in group 5 are 6 per cent registered bonds redeemable in 34 years. They were created under acts passed March 23, 1860; March 17, 1856; March 18, 1858, and March 29, 1851. The bonds issued under the act of March 23, 1860, would mature 34 years thereafter, to wit, March 23, 1894 and we have figured no interest on West Virginia's share of these bonds subsequent to that date; the bonds issued under the act of March 17, 1856, would mature 34 years thereafter, to wit, March 17, 1890, and we have figured no interest on West Virginia's share of these bonds subsequent to that date; the bonds issued under the act of March 18,

1858, would mature 34 years thereafter, to wit, March 18, 1892, and we have figured no interest upon West Virginia's share of these bonds subsequent to that date. The bonds issued under the act of March 29, 1851, would mature 34 years thereafter, to wit, March 29, 1885, and we have figured no interest upon West Virginia's share of these bonds subsequent to that date.

Of course, in the bonds comprising this and every other group, no interest is computed prior to January 1, 1861, because the unpaid interest up to that time is found by the Master and accepted by West Virginia as a part of the debt existing upon that date.

The bonds in group 6 are 6 per cent coupon bonds redeemable in 35 years, issued under the act of March 29, 1851, and interest upon West Virginia's share of these bonds is figured to March 29, 1886, being 35 years after March 29, 1851, the date of the act under which they were authorized.

The bonds in group 7 are 6 per cent registered bonds redeemable in 35 years. These bonds were issued in exchange for coupon bonds under act of March 18, 1856, but as these coupon bonds, for which the registered bonds were exchanged, were issued under the act of March 29, 1851, as shown in group 6 we figure the maturity as 35 years after this prior date of March 29, 1851, being March 29, 1886.

The bonds in group 8 are 5 per cent Sterling coupon bonds redeemable in 35 years, issued under

the act of March 29, 1851, and interest upon West Virginia's share of these bonds is figured to March 29, 1886, being 35 years after March 29, 1851, the date of the act authorizing the issue. Adding together the interest chargeable against West Virginia on the bonds in each of these 8 groups here listed the whole interest is found to be $14,055,-962.56. This sum is only about two-thirds of the interest for which she would be liable upon a strict enforcement of the full measure of her liability.

Adding to West Virginia's share of the interest as here computed her share of the principal, the total amount of West Virginia's liability is $21,-238,470.02.

We shall proceed to show that this amount is less than West Virginia would pay if interest was allowed for 34 years as her legislature was instructed to provide in article VIII of her constitution; it is much less pro rata than Virginia has actually paid upon her share of the debt, and it is about the same as West Virginia would pay if she were to take advantage of the various funding acts which Virginia passed with reference to her share of the debt.

Point Seven.

If West Virginia Should Pay Principal and Interest upon Her Proportion of the Debt in the Same Pro Rata Amount which Virginia Has Paid upon Her Proportion, or if West Virginia Should Scale Both Principal and Interest in the Same Way that the Various Funding Acts of Virginia Provided, or if West Virginia Should Pay Interest for 34 Years as Provided in Her Constitution the Amount Would be More than the Amount We Ask For.

The figures to substantiate these deductions are annexed as Schedule No. 5 of this brief.

Exhibit No. 7 of the plaintiff's bill shows that the amount paid off by Virginia between January 1, 1861, and February 1, 1906, or assumed or carried by her on account of the old debt of the undivided State amounts to $71,861,253.31. This schedule shows that Virginia's then existing interest-bearing debt on this account amounts to $25,537,820.00. Adding to the sum shown in Exhibit No. 7 interest at 3 per cent for seven and a half years upon $25,537,820 makes about $6,300,000, more to be added to the $71,861,253.31 stated as then paid out by Virginia.

If West Virginia does as well by the old bondholding creditors upon her share as Virginia has done with her share West Virginia will pay over

$24,000,000. Instead of $21,238,470.02, which we ask as her share.

If West Virginia paid interest for 34 years as her constitution bade her legislature to provide, West Virginia would pay $21,681,432.96 instead of $21,238,470.02 which we ask as her share.

If West Virginia settled her proportion of the debt on the basis of the 1871 and 1891 Funding Acts of Virginia, she would pay $27,009,087.32; if West Virginia settled her proportion of the debt on the basis of the 1871, 1879, and 1891 Funding Acts of Virginia she would pay $21,130,123.56; if West Virginia settled her proportion of the debt on the basis of the 1891 Funding Act of Virginia alone she would pay $21,145,680.96. If West Virginia settled her proportion of the debt on the basis of the 1871, 1882 Refunding Acts of Virginia she would pay $19,721,628.75. If West Virginia settled her proportion of the debt on the basis of the 1871, 1879, and 1882 Refunding Acts of Virginia she would pay $18,244,193.52.

These Refunding Acts of 1879 and 1882 of Virginia have sometimes been referred to as a partial repudiation, and still on the basis of these acts West Virginia would pay as her share over eighteen million dollars if she should have the benefit of both the acts of 1879 and 1882, taken together, applied to all of her share of the debt.

Conclusion.

We respectfully submit to the court that if the court feels that West Virginia's liability for principal and interest should be less than $21,238,470.02 which as we have already shown as to the interest portion thereof is one-third less than the full limit of her liability and desires to fix the total amount due from West Virginia at a sum less than $21,238,470.02 it should be so fixed only upon condition that West Virginia discharges that liability within a fixed period. If West Virginia does not discharge her liability within the period to be fixed by the court, then she should be held liable for the full amount of her obligation, principal and interest. Seven years of litigation and half a century of waiting is burden enough to impose upon any creditor, even a creditor of a sovereign State.

HOLMES CONRAD,
SANFORD ROBINSON,
Counsel for the Bondholding Creditors.

[Endorsed:] In the Supreme Court of the United States, October Term, 1913. Commonwealth of Virginia *vs.* State of West Virginia. Brief for bondholding creditors.

SCHEDULE I.

***West Virginia's Appendix to West Virginia Compilation, Vol. 1, Pages 444-472, Inclusive, and 490-496, Inclusive.**

Legislature of 1867.

On the 25th day of January, 1867, Governor Arthur I. Boreman sent to the legislature a communication, dated on January 20, 1867, from Governor F. H. Pierpont, of Virginia, together with a certain joint resolution adopted by the General Assembly of Virginia on the 28th day of February, 1866, in reference to the re-union of the States of Virginia and West Virginia and the adjustment of the public debt, and appointing Mr. A. H. H. Stuart, Mr. William Martin and Mr. John Janny as commissioners to proceed to the seat of government of West Virginia, and giving them authority to treat with the authorities of West Virginia on both subjects. On the 28th day of February, 1867, the legislature of West Virginia adopted the following joint resolution, to-wit:

Senate Joint Resolution No. 19, "To provide Commissioners to treat with the authorities of Virginia in regard to the public debt of that State."

Whereas, the General Assembly of Virginia, on the twenty-eighth day of February, 1866, adopted a series of resolutions deeply lamenting the dismemberment of the "Old State," and declaring a sincere desire to establish and perpetuate the reunion of the States of Virginia and West Virginia, and appealing to their brethren of West

*West Virginia's Compilation, Vol. 1, was prepared by Attorney General May of West Virginia. West Virginia's Compilation, Vol. 2, was prepared by Attorney General Conley of West Virginia. Both volumes were filed in the suit by West Virginia and have been repeatedly referred to in the briefs of both sides.

Virginia, to concur with them in the adoption of suitable measures of co-operation in restoration of the ancient Commonwealth of Virginia, with all her people and up to her former boundaries, and further providing for the appointment of three Commissioners with authority to treat on the subject of the restoration of the State of Virginia to its ancient jurisdiction and boundaries, and further empowering said Commissioners to treat with the authorities of the State of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State;

And whereas, Commissioners have been appointed on the part of the State of Virginia pursuant to, and for the purpose named in the resolutions aforesaid;

And whereas, the citizens of West Virginia deeply regret the civil strife (for which they are in no way responsible), in the midst of which they secured their State organization, yet they regard their separate State existence of the most vital importance to them, and have no purpose or intention whatever, of reuniting with the State of Virginia;

And whereas, the citizens of this State are not only willing but deeply anxious that a prompt and equitable settlement should be made between the States of Virginia and West Virginia, and they greatly regret that the State of Virginia has interposed a difficulty by the institution of a suit against this State, to recover jurisdiction over the counties of Berkeley and Jefferson, which they fear will delay such settlement; Therefore,

Resolved by the Legislature of West Virginia:

1. That the people of this State are unalterably opposed to a reunion of this State with the State of Virginia, and will not entertain any proposition looking to that end.

2. That so soon as the suit of Virginia against this State, now pending in the Supreme Court of the United States, to recover jurisdiction over the counties of Berkeley and Jefferson has been finally disposed of, the Governor of this State appoint three Commissioners on the part of this State to treat with the Commissioners appointed by the State of Virginia upon the adjustment of the public debt of said State as provided in Section IX of "An ordinance to provide for the formation of a new State," adopted by a convention of the people of Virginia on the 20th day of August, 1861, and in Section VIII, of Article VIII of the Constitution of West Virginia, and report their action to the Governor, to be by him communicated to the Legislature of this State for their approval or disapproval.

Legislature of 1870.

Governor William E. Stevenson in his message on the 18th of January, 1870, called attention to the resolution of February 28th, 1867.

On the 24th day of February, 1870, Gov. William E. Stevenson transmitted to the Legislature of West Virginia, then in session at Wheeling, a communication from Gilbert C. Walker, then Governor of the Commonwealth of Virginia, enclosing an act entitled "An Act for the adjustment of the public debt with the State of West Virginia," which had been passed by the General Assembly of Virginia on the 18th day of February, 1870.

On the 28th day of February, 1870, the Governor of West Virginia transmitted to the Legislature of West Virginia a communication from Messrs. William J. Robertson, W. T. Sutherlin and P. H. Aylett, commissioners appointed on the part of Virginia with reference to the settlement of the public debt of Virginia.

On the 1st day of March, 1870, the Legislature adopted the following joint resolution:

Joint Resolution raising a Joint Committee to confer with the Commissioners appointed by the State of Virginia, to adjust the Public Debt with the State of West Virginia.

Whereas, The State of Virginia, by act approved February the eighteenth, eighteen hundred and seventy, provided for the appointment of three commissioners to treat with the authorities of the state of West Virginia upon the subject of a proper adjustment of the public debt of the state of Virginia; and

Whereas, The governor by a communication dated February twenty-fourth, eighteen hundred and seventy, notified the legislature of the passage of the above recited act; and

Whereas, The governor on the twenty-eighth of February, eighteen hundred and seventy, notified the legislature that said commissioners, on the part of Virginia, had been appointed, and are now in the city of Wheeling for the purpose of carrying said act, above recited, into effect, therefore,

Resolved by the Legislature of West Virginia, That a joint committee of two upon the part of the Senate and three upon the part of the House of Delegates, be appointed by the presiding officers of their respective bodies, to confer with said commissioners, and report to this legislature the result of said conference.

2. All communications connected with said commission are hereby referred to said committee.

On the part of the Senate, Henry G. Davis and William I. Boreman were appointed.

On the part of the House, John J. Davis, Henry

Brannon and Francis H. Pierpoint were appointed.

Joint Resolution adding two members to the joint special committee to confer with the Virginia commissioners.

Resolved by the Legislature of West Virginia, That Daniel Lamb, on the part of the house, and one member on the part of the senate, be added to the joint special committee, to confer with the commissioners of Virginia, in relation to the Virginia state debt.

Adopted March 1, 1870.

The additional member on the part of the senate was J. D. Ramsdell.

So far as the journals of the House and Senate of the session of 1870 show, no report was made by this committee.

On the 3rd of March, 1870, the following resolution was adopted:

Joint Resolution relating to the adjustment of the public debt with the commissioners appointed for the purpose by the State of Virginia.

Resolved by the Legislature of West Virginia, That the governor appoint three resident citizens of this state, one from each congressional district, to treat with the authorities of the state of Virginia on the subject of a proper adjustment of the public debt of that state, due or incurred prior to the first day of January, eighteen hundred and sixty-one, and a fair division of the property belonging to that state on that day; and make report thereof to this legislature for its approval or disapproval at its next regular session, with the

facts and documents upon which their report is founded. *Provided,* that nothing herein contained shall be construed as waiving or impairing in any way the rights of this state to jurisdiction over the counties of Berkeley and Jefferson.

2. The commissioners so to be appointed shall proceed without delay in the execution of their duties, and as compensation for their services, shall receive six dollars per day for the time actually employed therein, and the same mileage as that allowed to members of the legislature.

Legislature of 1871.

Gov. William E. Stevenson in his message to the Legislature of 1871 discussed at length the Virginia debt proposition and explained the reasons why no report was made under the above resolution and submitted the matter again to this Legislature.

On the 15th day of February, 1871, the Legislature adopted the following joint resolution.

Joint Resolution authorizing the appointment of commissioners to treat with the state of Virginia on the subject of the state debt.

Resolved by the Legislature of West Virginia:

1. That the governor, on or after the fifteenth day of March, 1871, appoint three disinterested citizens of this state to treat with the authorities of the state of Virginia on the subject of a proposed adjustment of the public debt of that state prior to the first day of January, 1861, and make report thereof to the governor, to be printed and communicated by him to the legislature, at the commencement of its next session, for approval or disapproval.

2. The commissioners so to be appointed are further directed to ascertain and report the amount of said debt then held by persons other than the state of Virginia, and what said debt was incurred for, and what amount of this state debt was then held by the commissioners of the sinking fund and by the board of the library fund; that they ascertain and report the amount of all investments then held by the state, their respective amounts and character, and what portions thereof were then productive, and the dividends therefrom, and whether any of such investments then so held by said state have since been donated, changed, converted or disposed of by the authorities of said state, and if so, the amount and how disposed of; that they ascertain and report the revenue derived for the fiscal year ending on the thirtieth of September, 1860, from all sources, by the state of Virginia, within the present territory of Virginia, and the amount derived from all sources from the territory now composing the state of West Virginia; and that they report any other relevant matter deemed proper by them.

3. The commissioners so to be appointed shall proceed without delay in the execution of their duties, and as a compensation for their services shall each receive six dollars per day for the time they or any one or more of them may be actually employed therein, and the same mileage as that allowed to the members of the legislature, and may employ such accountant or clerk, at a reasonable compensation, as they may deem necessary; and the governor shall have the power to remove any one or more of the commissioners, and fill any vacancy that may occur from removal, death or failure to act.

4. Nothing herein contained shall be construed as waiving or impairing in any way the rights of

this state to jurisdiction over the counties of Berkeley and Jefferson.

5. That the foregoing resolutions be communicated by the governor to the governor of Virginia.

Adopted, February 15, 1871.

On the 15th day of February, 1871, the Legislature adopted the following joint resolution:

STATE OF WEST VIRGINIA,
EXECUTIVE DEPARTMENT,
CHARLESTON, *February* 17, 1871.

Gentlemen of the Senate:

I have the honor herewith to transmit a certified copy of a Joint Resolution, adopted by the General Assembly of Virginia, and approved February 11, 1871, tendering to West Virginia an arbitration for the apportionment of the public debt, which I this day received from His Excellency the Governor of Virginia. The resolution is accompanied by a letter from His Excellency, addressed to the Governor and Legislature of West Virginia, which I also respectfully communicate.

W. E. STEVENSON, *Governor.*

COMMONWEALTH OF VIRGINIA,
EXECUTIVE CHAMBERS,
RICHMOND, *February* 10, 1871.

To His Excellency the Governor and General Assembly of West Virginia:

In pursuance of the authority vested in the Governor by a Joint Resolution passed by our General Assembly, and approved on the fourteenth day of February instant, entitled "Joint Resolution tendering to West Virginia an arbitration for the apportionment of the public debt," an authenticated copy of which is hereto attached, I

Gilbert C. Walker, Governor of the Commonwealth of Virginia, on behalf of said Commonwealth, do hereby tender to the State of West Virginia "an arbitration of all matters touching a full and fair apportionment between said States, of the said public debt, contracted by the State of Virginia prior to January 1, 1861," upon the conditions in said Joint Resolution specified, viz: Each State to select two arbitrators, not residents thereof, and the four thus selected to appoint an umpire, if they shall deem it advisable, and the arbitrators and umpire thus chosen, to proceed, as soon as practicable, to adjust, award and decide upon fair, just and equitable principles what proportion of said public debt should be paid by West Virginia, and what part thereof should be paid by the State of Virginia: each State being represented by counsel if desired. The sole duty of the arbitrators and umpire will be to ascertain the amount of the public debt which each State ought justly to assume and pay.

It is earnestly hoped that the State of West Virginia will promptly accept this fair and equitable mode of adjustment of the public debt, to the end that the question involved may be speedily, satisfactorily and finally settled.

I have the honor to be, very respectfully, your obedient servant,

G. C. WALKER,
Governor of the Commonwealth of Virginia.

Joint Resolution Tendering to West Virginia an arbitration for the apportionment of the public debt.

(Approved February 11th, 1871.)

Whereas, the constitution of both Virginia and West Virginia impose upon the respective legis-

latures of said States the duty to provide by law, for the adjusting between them the proportion of the public debt, contracted prior to the first of January, 1861, proper to be borne by each of said States; and

Whereas, it is essential to the financial interests of Virginia that said settlement should be obtained as soon as practicable, therefore

Be it Resolved by the General Assembly of Virginia:

That the Governor of this Commonwealth be, and he is hereby, authorized to tender to the State of West Virginia an arbitration of all matters touching a full and fair apportionment between said States of the public debt, and in the event of the acceptance of such offer of arbitration by West Virginia, then the Governor, Lieutenant Governor, President of the Court of Appeals, Auditor of Public Accounts and the Secretary of the Commonwealth shall appoint two arbitrators on the part of this State, who shall not be citizens of this State, to meet any two arbitrators selected by West Virginia, not citizens of said State.

The arbitrators so appointed shall, if they deem it advisable, appoint an umpire. Said arbitrators and umpire shall, as soon as practicable, proceed to adjust, award and decide upon fair, just and equitable principles what proportion of said public debt shall be paid by West Virginia, and what part thereof shall be paid by this State. Said apportionment, when ascertained and made, to be reported by said arbitrators to the Legislatures of said States, to enable them to carry out such award or apportionment by appropriate legislation.

Each State may be represented by counsel, and the board hereby directed to appoint the arbitrators for Virginia shall be, and are hereby, authorized to draw on the Treasury of the State of Virginia, out of any money not otherwise appropri-

ated, a sum sufficient to defray the necessary expenses of this arbitration on the part of Virginia.

A copy.

(Signed) J. BELL BIGGER,
Clerk of House of Delegates and
Keeper of the Rolls of Virginia.

February 11, 1871.

On the same day the Legislature adopted the following joint resolution:

"Senate Joint Resolution No. 19, 'Raising a Joint Special Committee to consider the communication from the Governor of Virginia, concerning the proposed arbitration of the debt between Virginia and West Virginia.'"

"*Resolved by the Legislature of West Virginia:*

"That a Joint Special Committee of three on the part of the House of Delegates, and two on the part of the Senate, be appointed to consider and report on the communication from the Governor of Virginia, concerning the proposed arbitration of the public debt between Virginia and West Virginia."

On the part of the Senate, Mr. Henry G. Davis and Mr. George Koonce were appointed as members of such committee, and on the part of the House, Mr. James M. Jackson, Mr. James H. Ferguson and Mr. George C. Sturgiss were appointed as members of such committee.

On the 20th day of February, 1871, this special committee made the following report:

"To the Legislature of West Virginia:

"The Joint Special Committee, to whom was referred the special message of the Governor of the State, enclosing a Joint Resolution of the Gen-

eral Assembly of Virginia and the communication of the Governor of said State, tendering to West Virginia an arbitration for the apportionment of the public debt of Virginia contracted prior to the first of January, 1861, have had the same under consideration and submit the following

Report.

"The Legislature, by Joint Resolution No. 21, passed February fifteenth instant, having conferred upon the Governor authority, and instructed him to appoint three disinterested citizens of this State to treat with the authorities of the State of Virginia, on the subject of a proper adjustment of the public debt of that State, prior to the first day of January, 1861, and the authorities of the State of West Virginia having ever evinced a sincere desire to adjust and settle at the earliest practicable moment, the proportion of said debt proper to be borne by each of said States, and the Committee believing that the citizens of the respective States would of necessity be more familiar with the circumstances attending the creation of said debt and the many intricate questions connected therewith, and upon the proper comprehension of which must depend the equitable adjustment and apportionment of the same between said States, recommend that said tender of arbitration by arbitrators and umpire not citizens of either State, be respectfully declined; and that the said State of Virginia be invited to appoint three disinterested citizens of that Commonwealth as Commissioners, with authority to treat with like Commissioners to be appointed under said Joint Resolution No. 21, on behalf of this State, with power to adjust, award and decide upon fair, just and equitable principles, what proportion of said debt should be paid by each of said States,

subject to the ratification and approval of the General Assembly of Virginia and the Legislature of West Virginia; and to carry out the objects herein stated; the Committee recommend the adoption of the following:

"Senate Joint Resolution No. 21, 'Providing for the settlement of the debt between Virginia and West Virginia.'"

"Whereas, the Legislature of West Virginia in discharge of the duty imposed by the Constitution of the State, to 'ascertain as soon as may be practicable' the equitable proportion of the public debt of the Commonwealth of Virginia to be assumed and liquidated by this State, has authorized and directed by Joint Resolution passed on the fifteenth day of February, 1871, the appointment by the Governor of 'three disinterested citizens of this State to treat with the authorities of the State of Virginia on the subject of a proper adjustment of the public debt of that State, prior the first day of January, 1861;'" and

"Whereas, the Governor of the Commonwealth of Virginia, by authority conferred by a Joint Resolution of the General Assembly of said Commonwealth, passed February 11th, 1871, has tendered on behalf of said Commonwealth to the State of West Virginia, 'an arbitration of all matters touching a full and fair apportionment between said States, of the said public debt' by arbitrators, not citizens of either of said States, and not subject to the ratification of the legislative departments of said States; and

"Whereas, any adjustment of the said debt should be subject to such ratification; and

"Whereas, citizen commissioners would of necessity be more familiar with the circumstances

attending the creation of said debt, and the many intricate questions connected therewith, and upon the proper comprehension of which must depend the equitable apportionment and adjustment of the same between said States; therefore,

"*Resolved by the Legislature of West Virginia:*

"1. That the tender of an arbitration made by the Governor of the Commonwealth of Virginia to this State for the adjustment of the public debt of said Commonwealth, having been anticipated by the action of the Legislature of this State, authorizing the appointment of Commissioners to treat upon said subject, the said tender is respectfully declined, and the Commonwealth of Virginia is invited to appoint three disinterested citizens as Commissioners with authority to treat with like Commissioners heretofore authorized on the part of this State. And said Commissioners on behalf of this State in addition to the powers heretofore conferred, are hereby further empowered to proceed, as soon as practicable, to adjust, award, and determine, upon fair, just and equitable principles, what proportion of said public debt of Virginia should, in their opinion, be paid by West Virginia, and what part thereof should be paid by Virginia, subject, however, to the approval and ratification of the Legislature of West Virginia and the General Assembly of Virginia.

"2. The governor of this State is hereby directed to communicate to the Governor of the Commonwealth of Virginia, without delay, certified copies of this preamble and Joint Resolution.

Respectfully submitted,

JAMES M. JACKSON,
JAMES H. FERGUSON,
GEORGE C. STURGISS,
H. G. DAVIS,
GEORGE KOONCE,
Committee."

"February 20, 1871."

This report was signed by all the members of the Committee and the resolution therein set out was on the 24th day of February, 1871, adopted by the Legislature.

Under the resolutions of February 15th and 24th Governor J. J. Jacob appointed Mr. John J. Jackson, Mr. J. M. Bennett and Mr. A. W. Campbell.

Report of the Virginia Debt Commissioners of 1871.

Report of the Virginia Debt Commissioners of 1871.

To His Excellency J. J. Jacob, Governor of West Virginia.

SIR: Under the joint resolutions passed by the West Virginia Legislature on the 15th and 24th days of February, last, the undersigned were appointed Commissioners by you "to treat with the authorities of Virginia on the subject of a proposed adjustment of the public debt of that State prior to the first day of January, 1861," and were directed by the legislature "to make report thereof to the Governor," which we have the honor to do as follows:

On the 9th day of August last the Commissioners met in Parkersburg to confer together upon the subject matter of their appointment and to organize a programme of procedure in respect thereof. They addressed a letter to your Excellency notifying you of their meeting and organization, and also the following letter to Governor Walker, of Virginia:

PARKERSBURG, W. VA., *August* 9, 1871.

To His Excellency the Governor of Virginia.

SIR: The undersigned have the honor to inform you that under the joint resolutions passed by the legislature of West Virginia on the 15th and 24th days of February last, they have been appointed Commissioners by the Governor of West Virginia to treat with Virginia in regard to the debt as it stood on the first day of January, 1861."

Also, that they met in this city to-day for the purpose of entering upon the discharge of their duties, and to this end have designated General John J. Jackson as their chairman, through whom they propose to receive such communications as your Excellency may be pleased to submit.

Will your Excellency be pleased to indicate at your earliest convenience what action, if any, has been or is likely to be taken by Virginia in the matter of appointing Commissioners, or, in the event of no such appointments, what channel of communication will be open to us.

We have the honor to be

Your Excellency's most ob't servants,

JOHN J. JACKSON.
J. M. BENNETT.
A. W. CAMPBELL.

After forwarding this letter, together with the one to your Excellency, the Commissioners adjourned to meet in Richmond on a day to be agreed upon later in the season, there to confer with the authorities of Virginia, and to make such examination of public documents as might enable them to carry out the objects of their appointment.

Meanwhile they received from the Governor of Virginia in answer to their letter of August 9th, a letter dated September 7th, the same purporting to be a copy of a letter addressed to your Excellency, and which is as follows:

EXECUTIVE CHAMBERS,
RICHMOND, *Sept.* 7, 1871.

His Excellency J. J. Jacob, Governor of West Virginia.

SIR: I have the honor to acknowledge the receipt of your communication of the 17th ulto., notifying me of the appointment of Messrs. Bennett, Jackson and Campbell as Commissioners on behalf of the State of West Virginia to treat with the authorities of this State upon the subject of the State debt. I have also received a certified copy of the joint resolutions empowering you to make these appointments. Absence from the capital has prevented an earlier response to these several communications.

On the 18th of February, 1870, an act was passed by the Legislature of this State, and approved by me, authorizing the Governor to appoint three Commissioners on behalf of this State to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, and a fair division of the public property.

Commissioners were promptly appointed under this act, and notice of their appointment, together with an authenticated copy of the act, were at once forwarded to the Governor of West Virginia. No response whatever to my communication was made by the Governor of West Virginia, but I learned through other sources that the matter was promptly submitted to the Legislature then in session, by which, either by act or resolution, the Governor was authorized to appoint Commissioners to meet and confer with those appointed from Virginia. I have never been informed, however, of the appointment of any Commissioners under the authority thus conferred.

A history of these proceedings, together with a statement of my own views upon the subject, was submitted to our Legislature in my annual message of December last, a copy of which I herewith enclose. The Legislature, acting upon the suggestion of the message, on the 11th day of February last, by a joint resolution, authorized the Governor to tender to the State of West Virginia "an arbitration of all matters touching a full and fair apportionment between said States of the said public debt," an authenticated copy of which joint resolution, together with the tender of an arbitration as therein authorized, was promptly forwarded to the Governor of West Virginia.

This joint resolution, while it does not in terms repeal the act of February 18th, 1870, was intended to *supersede* it, and therefore I do not feel authorized to appoint Commissioners. Our tender of an arbitration has not been withdrawn, and I regret exceedingly that the authorities of West Virginia declined to accept it. I cannot understand what reasonable objection can be raised to this fair and equitable mode of adjustment so frequently resorted to by individuals and nations, and I trust that West Virginia will reconsider her action and accept the more speedy and satisfactory mode of settlement proposed by Virginia, to the end that prompt justice may be done to the creditors of the old State, and that harmony and good feeling may prevail between the people of the two States.

Very respectfully,

Your Excellency's ob't servant,

G. C. WALKER,

Governor of Virginia.

(P. S.—Accompanying the above.) "The foregoing is a copy of the original letter mailed to Governor Jacob."

From this letter we at once understood that so fas as a conference with Commissioners or other persons authorized to represent Virginia in that capacity was concerned, our mission was at an end. But the joint resolution under which we were acting, copies of which you had forwarded for our guidance, directed that we should "ascertain and report the amount of the debt of Virginia on the first day of January, 1861, and what said debt was incurred for, and what amount of this State debt was then held by the Commissioners of the Sinking Fund, and by the Board of the Library Fund." Also that we should "ascertain and report the amount of all investments then held by the State, their respective amounts and character, and what portion thereof were then productive, and the dividends therefrom, and whether any of such investments then held by said State have since been donated, changed, converted or disposed of by the authorities of said State, and, if so, the amount and how disposed of." Also that we should "ascertain and report the revenue derived from the fiscal year ending on the 30th of September, 1860, from all sources by the State of Virginia within the present territory of Virginia and the amount derived from all sources from the territory now comprising the State of West Virginia;" and also that we "report any other relevant matter deemed proper" by us.

In addition to the foregoing duties thus devolved upon us by the terms of the joint resolution passed on the 15th day of February, we "were further empowered," in the language of the additional joint resolution passed on the 24th of the same month, "to proceed as soon as practicable to adjust, award and determine upon fair, just and equitable principles what proportion of said public debt of Virginia should in their opinion be paid by West Virginia, and what part thereof should be

paid by Virginia, subject, however, to the approval and ratification of the Legislature of West Virginia and the General Assembly of Virginia."

Under this authority and direction, thus minutely specified to us, we felt called upon to take substantially the same steps after the receipt of Governor Walker's letter of September 7th as we would have taken had we expected to meet Commissioners representing Virginia, viz: to go to Richmond and endeavor to gather the information expected and required under the terms of our appointment.

Accordingly we met in that city on the 9th of November last and after spending several days in the examination of such public documents as were available to us at the Capitol, and realizing the necessity for further and more explicit and official information than we could gather of ourselves unassisted from said documents, we addressed the following note to the Second Auditor of Virginia:

RICHMOND, *November 14th*, 1871.

To the Second Auditor of Virginia:

SIR: I am directed by the Commissioners representing West Virginia in the matter of the public debt of Virginia prior to the first of January, 1861, to procure from your office such information as can be furnished upon the following points, viz:

1. The actual amount of the public debt of Virginia on the first of January, 1861. And under the head the amounts of said debt owned by the Sinking Fund, the amount owned by the Literary Fund, and the amount owned by the Library Fund.

2. What portion of the bonded debt was invested, and how invested on the first of January, 1861. Also what portion of the investment was productive, what were the dividends or profits

arising therefrom for the year 1860, and whether any such investments have since been donated, changed, converted or otherwise disposed of.

3. What portion of the appropriations expended in West Virginia for public improvements came from the sales of State bonds and what portion from the revenues or taxes of Virginia.

4. A copy of the advertisement for the redemption of a portion of the public debt on the first of January, 1861.

5. A statement of the amount of public debt actually redeemed on the first of January, 1861, pursuant to said advertisement.

Upon these points the Commissioners desire to hear from you at your earliest convenience.

Very respectfully, your obedient servant,

A. W. CAMPBELL, *Secretary.*

In reply to the foregoing communication we received the following note at 5 o'clock on the evening of the 16th of November, after a lapse of two and a half days, and after we had abandoned all hope of the assistance asked for in our letter, and after, in fact, we were on the eve of our departure for home:

SECOND AUDITOR'S OFFICE,
RICHMOND, *Nov.* 16, 1871.

A. W. Cambell, Esq., Secretary, &c.:

DEAR SIR: Yours of the 14th was received. You ask me for a report upon a variety of questions connected with our public debt, the transactions of the Board of Public Works in regard to it, and the financial affairs of the State, which it is understood, of course, you propose to use in the contemplated adjustment of the portion to be paid by West Virginia of the debt.

To answer the questions propounded would in-

volve an amount of labor which we could not bestow on the subject.

But, apart from this, I presume at an early day this office will be called upon by the Executive or the General Assembly of Virginia for detailed reports of all the matters referred to, which will be available to you.

The books and records of this office are open to your inspection.

I trust that in failing to respond to your inquiries you will not regard me as in any wise wanting in official courtesy to you or your associates. None, certainly, is intended.

I have the honor to be,

Most respectfully yours,

ASA ROGERS.

With the reception of this note the Commissioners closed their labors in Richmond, finding that a further stay was not likely to add to the scant information already gleaned by them from the public documents.

It is proper to say in connection with the Second Auditor's communication that we, in delivering our own communication to him, caused it to be verbally understood that we were ready and willing to pay for the services of an expert, competent to obtain for us the information requested, and that we did not desire or intend to trench upon the services of any one with whose duties the labor required might seriously conflict.

After this termination of their visit to Richmond, the Commissioners agreed to meet again on the 12th of December following, at Parkersburg, there to prepare and transmit to your Excellency such information as they had been able to obtain, and such as they might still further obtain, and along with it such an expression of opinion as is called for in the joint resolution of February 24th.

Accordingly we met in Parkersburg at the date named, and after nearly two weeks of examination and comparison of all the sources of information accessible to us, agreed upon and drew up the facts and statements hereinafter presented.

Previous to this meeting we had just received copies of the Richmond papers of December 7th, containing Governor Walker's message to the General Assembly of Virginia at its meeting on the 6th, in which we observed that among other allusions to the debt question pending between the two States, and after a reference to our correspondence with him of August last and his answer thereto, as already quoted, he proceeds to arraign the good faith of the authorities of this State as follows:

"Now, if the authorities of West Virginia entertained an earnest desire to make a speedy and final settlement of this matter, why did they not accept our tender of arbitration? A mode of settlement of such controversies universally recognized by both nations and individuals as right and appropriate. Suppose an equal number of Commissioners appointed by each State, and that they should meet and disagree upon any or all points involved, who is to decide between them? And yet, beyond a doubt, they would radically disagree upon the first or chief point to be settled, viz: the basis or principle upon which the settlement should be made. But suppose that the Commissioners should finally agree, does any one suppose that their finding would be ratified by the legislatures of the two States, disagreeing as the people do radically upon the merits of the question at issue? Of course not."

This quotation from Governor Walker's message fairly exhibits the spirit in which he has seemed to view not only our own efforts to carry out the objects of our appointment but likewise

the sincerity and good faith of the Legislature of West Virginia in providing for the appointment of such a commission by your Excellency. And yet while this is the case it is not to be forgotten that Virginia herself initiated this method of attempting to adjust the debt question. And the language of the Governor would seem to be all the more gratuitous in such a connection from the fact that in his annual message of December 7th, 1870, he considered it worth while to allude to the political change that had taken place in this State at the preceding October election, and bespoke in so many words for the "new administration" an "opportunity of manifesting its intentions and its appreciation of honesty and fair dealing." And yet notwithstanding this language by himself thus voluntarily employed on our behalf, and notwithstanding also the fact that one of the early acts of the "new administration" was to respond to the policy that Virginia herself had initiated, and before it was known in this State that she had changed that policy, and while the appointees under the response were in Richmond seeking in vain from the proper authority of Virginia for such information as every debtor is entitled in law to receive from his creditor, saving nothing of that spirit of "fair dealing" that was so conspicuously spoken on our behalf, Governor Walker proceeds in his late message to asperse the good faith of the State of West Virginia after the manner and in the words that we have quoted.

The authorities of West Virginia have never assumed to themselves any right of precedence in the matter of a policy for adjusting the difficulties surrounding the debt question. But in the joint resolution passed on the 24th of February last they did assume the modest right of adhering to the policy already inaugurated by the State of Vir-

ginia, and by her so freely tendered heretofore for their acceptance, and therefore they respectfully declined to adopt a new and different proposition from her until they could test the merits of the one already adopted.

Apparently the present Executive of Virginia, from an enforced familiarity with the workings of "personal government," which he so much deplores, has acquired ideas as to the right of the initiative between equal contracting parties that are scarcely consistent with the delicacy of the issue pending between this State and his own. For instance, in his letter of September the 7th, he tells us that the legislature of Virginia, upon his suggestion, has tendered an arbitration to this State, and he trusts "that West Virginia will reconsider her action and accept the more speedy and satisfactory mode of settlement proposed by Virginia." And again, in his late message, he says that "the better course to be pursued is for the two States to submit the whole question to arbitration," and West Virginia is arraigned, as heretofore shown, for not concurring in his opinions. Apparently it did not occur to the Governor that since Virginia had proposed both modes of settlement to this State, the latter might make her choice between them without subjecting her motives to imputation. And yet all that she had assumed to do is simply to chose between two policies initiated by Virginia. Unless, therefore, it can be shown that it is the prerogative of that State to prescribe the terms upon which the debt shall be adjusted the question should hereafter be discussed in a spirit better calculated to allay all sectional irritation.

But we pass from this incidental reference to Governor Walker's strictures upon the attitude of this State towards the debt question to the action

of the Virginia legislature upon the same question as embodied in the act approved on the 30th of March last, and known as the Funding bill. This act is in keeping with the initiatory legislation in regard to the debt to which we have just referred. It assumes to apportion the debt of that State arbitrarily, notwithstanding her authorities had six weeks before the passage of the act received notice of the joint resolution of the West Virginia Legislature providing for the appointment of Commissioners. It assumes, also, to apportion the debt, not as it stood on the first day of January, 1861, but as it would stand on the first day of July, 1871, after the interest had been twice compounded, once in 1866, and again at the date last named; and to apportion it, too, upon the basis of territory and population, and without any reference to the equities that should always govern an assignment of debt between sections that were so notorious in our own case. In other words it assumes to apportion to West Virginia one-third of the debt as it now stands, simply on the ground that she has one-third of the territory and population formerly belonging to Virginia, and without reference at all to the question of resources and values. This is apparently the practical result which Governor Walker hoped to reach when he urged upon us the "more speedy and satisfactory mode of settlement proposed by Virginia," inasmuch as he tells us in his late message that this is the "plan for a reorganization of the State debt," which he "had recommended twelve months before."

But without reference to the authorship of this or any other "plan" for adjusting the debt question, we propose to consider as briefly as possible the real cause now pending between Virginia and West Virginia as we understand it.

The tables or statements which we annex as part

of our report show, among other things, the following facts:

That the funded debt of Virginia on the first day of January, 1861, was $31,778,867.32, after all reductions.

That all, or nearly all, of this debt was incurred for and actually expended in works of public improvements, such as canals, railroads, turnpikes, plank roads and bridges.

That this vast sum, upwards of $30,000,000 was expended for improvements in the present State of Virginia, and only about two and a half millions in the present State of West Virginia.

That the present State of Virginia contains 41,352 square miles and West Virginia only 20,000 square miles, or less than one-third.

That the counties composing what is now Virginia contained by the census of 1860 a population of 1,220,829, and those composing West Virginia only a population of 374,985, or less than one-fourth.

To these exhibits we append others, under our instructions from the legislature, but they are such as do not enter into our argument here, which is to show that no just apportionment of the debt can be made upon the basis of population and territory alone, which is the basis upon which the Virginia Funding bill is confessedly predicated.

This theory of apportionment is apparently quite current among the people of that State, and is defended with ability by Judge Meredith, of Richmond, in a carefully prepared paper on the subject. His position is that West Virginia should pay one-third of the debt because, as he says, it is a principle of international law governing the division of nations that "the obligations which had accrued to the whole before the division are, unless they are the subject of special agree-

ment, ratably binding upon the different parts." This he gives as a quotation from Phillimore. Two inquiries present themselves in connection with it. First, was Virginia a nation in the sense intended by Phillimore? and, second, what are we to understand by a ratable part of a debt? We presume that it will not be contended that the general rights and obligations of a nation, as defined by international law, belonged to Virginia prior to the division of the State, and therefore we cannot admit the applicability of the quotation in that particular. Neither can we admit Judge Meredith's construction of the word ratable. He applies it exclusively to territory and population and excludes everything in the shape of resources and value, such as public works, buildings and institutions, which, as we all know, vitally affect the equity of a division of territory.

Judge Meredith next adduces the following quotation from Chancellor Kent to sustain his position:

"If a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement those rights are to be enjoyed and those obligations fulfilled by all the parts in common."

This quotation is much more intelligible and just, and we think will tend to sustain the conclusions we have reached, as hereinafter stated.

In addition to the two quotations already given, Judge Meredith cites other authorities to sustain his position that West Virginia is chargeable with one-third of the debt, but we do not regard them as applicable to the case under consideration. First, because Virginia is not a nation. Second, because in all the cases referred to in the authorities quoted, treaty stipulations had more or less to do with the question. Third, because the debts were

war debts, the benefits of which, if any, accrued to each individual, and the obligations of which therefore rested upon each. In no instance was the debt created for internal improvements which necessarily confer partial and local benefits that in most cases exceed the general benefit to the State at large. We, therefore, fail to see the proper analogy that should exist to make these citations precedents for the case of Virginia and West Virginia.

Judge Meredith winds up these references to various authorities, by two general deductions of his own, as follows:

1. "That the public debt of a State is not affected by a change in the form of its government, nor by the partition of its territory into two States, but remains in full force and must be discharged."

2. "That if a State be divided into two or more States, the debts which had been contracted by the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts in proportion to territory and population."

The first deduction it is not necessary to consider, as West Virginia, in her ordinance of separation from Virginia, as also in her constitution, agreed to pay an equitable proportion of the public debt. What that equitable proportion is we are now considering.

In reference to the second deduction we have to remark that Judge Meredith draws a conclusion from his authorities which they do not sustain. Phillimore, for instance, says that "if a nation be divided into various distinct societies, the obligations which had accrued to the whole before the division are ratably binding upon the different parts." Here Phillimore and the authorities stop. But this does not suffice for the Virginia side of the question, and Judge Meredith adds

after the word "parts" the words "in proportion to territory and population." These words are not found in any of the authorities, so far as we are advised, and certainly not in any of the quotations adduced by the Judge.

A moment's consideration will show that a division of debt according to population and territory would not only be impracticable but would conflict with common sense. It would be impracticable because it does not determine the relative value of each one of the two elements of population and territory. Suppose the population to be twice as much as the territory, or suppose the territory to be three times as great as the population, which element has the greater value in determining the result?

Without pursuing this thought further it is manifest that nothing is settled by such a rule. You must fix the relative value of the two elements before you can reach a conclusion. It is, therefore, plain why the books do not give the rule as stated by Judge Meredith. Because of its indefiniteness, but mainly because of its injustice. Would any sane man lay down a rule for the division of a State which would ignore the great cities, public improvements, public works, institutions of all kinds, great commercial advantages, such as rivers and harbors and the great advantage of fertility; all of which, and many other elements of wealth, property and power, might be found in one division and be wholly absent in the other. Hence we say that such a rule is repugnant to common sense.

A public debt is mainly a charge upon the wealth and resources of a people. It is represented by taxes, and taxes are imposed not on numbers or square miles but on resources and values. How much stronger is the case when the very debt under

consideration was created in developing and enriching one portion of the State almost exclusively. Nay, more, when that division of the State is in possession of and enjoying, giving away and selling at auction and otherwise disposing of the very subjects for which the debt was created.

These considerations afford abundant reason why no authority would say, in the absence of a compact (unless there was perfect homogeneity) that it would be just to divide a "nation" any more than an individual estate by population and territory. We doubt not that Judge Meredith himself would scout the idea of dividing an estate on such a basis and without reference to the quality of the land and the improvements made. Why then would he ignore such considerations in apportioning a public debt between two divisions of a State? Chancellor Kent, whom he has quoted, does not sustain him in so doing. The quotation already given from that author says that "if a State should be divided in respect to territory its rights and obligations are not impaired; and if they have not been apportioned by agreement, those rights are to be enjoyed and those obligations fulfilled by all the parts in common." Not a word in this quotation about a division ratably according to population and territory. According to this authority the State of Virginia was only a tenant in common with West Virginia in all the public works, improvements and property of the original undivided State, and had no authority to alienate, sell, give away, or dispose of any of the public works, and being in possession and holding them for her own exclusive use and benefit, by ousting West Virginia, she would be bound to account to the latter for her share. This would seem to be the legitimate conclusion from the authorities relied on by Judge Meredith, even admitting their applicabil-

ity to the case under consideration, which we do not concede by any means; and, therefore, with this reference we pass them by.

We think we take a more practicable view of the subject, and one which will attain all the ends of justice. The table accompanying this report shows that the bonded debt of Virginia on the first day of January, 1861, represented money borrowed and expended in improving the State by canals, railroads, turnpikes, plank roads and bridges. All these expenditures conferred a local and special benefit, were expended, not only by the outlay of the money in creating a market and stimulating enterprise and trade, but in otherwise developing the resources of particular localities to an extent quite equal to the general benefit of the State at large. And this local and general development is the sum of the value of the improvements to the section where located, and gives them an inestimable and abiding value to that section. This value is progressive and not susceptible of being fixed. So certainly is this the case that it is probable, if it were practicable to utterly extinguish these improvements, and thereby extinguish the debt, that the State where they are located would not listen to such a proposition.

It may be assumed then that the public works for which the debt was created are worth what they cost. Virginia, by selling, donating, and disposing of these works as her own property, without regard to the rule laid down by Chancellor Kent, and without consulting West Virginia, must be taken to have accepted them on that basis, and is therefore chargeable with them on that basis.

When the tables are consulted they will show an expenditure of over thirty millions in Virginia and about two and a half millions in West Virginia. Much of this latter was expended at comparatively recent dates, whereas the expenditures in Virginia

range through a period of fifty years, with benefits accruing more or less throughout that period. In the light of such facts, we submit that no intelligent mind, wishing only to do justice, can doubt for a moment that the benefits conferred, and not the territory and population, should be the principal, if not the only basis of an adjustment of the debt. The Governor of Virginia, in his message of 1870, and again in 1871, and the Legislature of that State, by its funding bill, seem, however, to have entirely overlooked the foregoing considerations, and to have jumped to the conclusion that West Virginia should pay one-third of the debt.

We see the case differently. On the one hand, for instance, we see rich cities, commercial marts of all kinds, navigable rivers, fine harbors, a highly improved and productive territory, wealthy capitalists and a well to do people, public institutions, such as a State Capitol and extensive public grounds, an Executive Mansion, a Penitentiary, Armory, University, two Lunatic Asylums, a Military Institute, a Blind Asylum, a valuable miscellaneous and law library, a large literary fund and the United States deposit of surplus revenue. All these resources in addition to the vast millions invested in canals and railroads and other avenues of inland commerce.

On the other hand we see set in the balance against these rich resources the territory of West Virginia, less than one-third of the old State, much of it broken into barren mountains and hills, no navigable streams penetrating it in every direction, no railroad but the Baltimore & Ohio, no public works or institutions, her lands mostly covered with unbroken forests and rewarding industry but grudgingly, no outlets in the interior for the little surplus existing, the people poor and subsisting by rough work in the woods and fields, pos-

sessed of no capital wherewith either to develop their localities or ameliorate their own condition in life in fact, their only wealth being for the most part their poor soil, their untiring perseverance and their indomitable love of liberty.

And yet, notwithstanding this great discrepancy between the condition and resources of the two States, Virginia assigns one-third of her funded and compounded debt to West Virginia to pay, simply because the latter has one-third of the territory and one-fourth the population formerly belonging to the whole State. And this, too, notwithstanding her papers have often proclaimed that West Virginia was a foster child of the old State, and as such dependent upon her bounty. This opinion we shall not stop to discuss, and we only refer to it as showing the inconsistency between the theory and practice of our Virginia friends. Supposing it to be correct, the explanation as to how it came about can never be made creditable to those who lavished all their favors on one section of the State, and withheld them from the other, and the vindication of the step taken by West Virginia during the war in separating from the old State consists largely of this traditional discrimination against her. And in this connection it may not be out of place to notice that the increase of population in West Virginia during the decade from 1860 to 1870 was of a character to still further vindicate the step taken, it being about thirty per cent. This large increase illustrates her onward march since her separation from her former foster parent, and tends to suggest how far in advance of her present position she really might have been had she received in the past anything more than "the crumbs that fell from the rich man's table."

We come now to the conclusion of our report. Having given our reasons why we dissent entirely

from the position of Virginia in reference to the debt, we proceed to state our own conclusions in regard to it as follows:

Statement A, as annexed to our report, shows that the bonded debt of Virginia, on the first of January, 1861, after all deductions, was $31,779,-067.32.

The same statement also shows that all of said debt was expended within the present State of Virginia, with the exception of $2,784,329.29.

Statement E, shows that $328,706.22 was collected from counties in West Virginia after January 1st, 1861.

Statement F, shows that the amount of expenditures for all purposes in West Virginia was $3,-343,929.29.

We are not able to say certainly what part of this expenditure was from the proceeds of State bonds, (and, therefore, a part of the State debt) and what part was appropriated from the regular receipts of the treasury. We have had access to no data that could determine the question. Our letter to the Second Auditor at Richmond sought information on this point in vain. But we have given Virginia the benefit of it all as a credit on her side of the account, although the resolutions under which we are acting contemplate nothing on the part of West Virginia but an assumption of her proportion of the bonded debt, inasmuch as both sections and particularly Virginia, received appropriations out of the ordinary receipts of the treasury.

We have charged West Virginia with all that we have found expended within her limits, viz: The amount of the funded debt created for improvements within her territory, the amount invested in her banks, the amount expended on the Lunatic Asylum at Weston, and the estimated value of the property known as the Lewisburg Law Library.

On the other hand we have credited her with her share of the estimated value of the public property and assets of Virginia, other than the property represented in the bonded indebtedness. This latter equalizes itself, and therefore does not enter into the account. Virginia has the property and owes the debt which it represents. We refer only to the public buildings, institutions, and other assets as given in statement G. As to West Virginia's share in these we can only venture an approximate estimate. The public buildings, the common property of the two States, paid for out of the general revenue, we have estimated at $3,875,000, as per statement G, and it would be reasonable we think to estimate West Virginia's interest in them at one-fourth on the basis of population.

The same statement shows that the surplus revenue of the United States deposited with the State under the act of Congress, June 23, 1836, gave Virginia $2,937,237.34, of which sum she appears to have received at least $1,932,809.33. This act assigned to each State its share of deposits on the basis of its representation in Congress, and Virginia having, in 1860, thirteen representatives, three of whom were from West Virginia, it would seem that three-thirteenths of that fund belonged to the latter.

To this share of the deposits, and her interest in the public property, we add, as per statement, her proportion of the Literary Fund. This fund at the date quoted in statement G, amounted to $1,509,583.16: As it was apportioned throughout the State on the basis of the white population, we follow that rule in assigning to West Virginia three-sevenths of it, that being her ratio of white population in 1860.

Upon the data thus ascertained and explained, we summarize the account between the two States as follows:

WEST VIRGINIA TO THE STATE OF VIRGINIA.

Dr.	For the amounts expended and invested in her territory as set forth in statement F		$3,343,929.29
Cr.	By one-fourth of the estimated value of the public buildings and other assets, as given in statement G	$968,750.00	
"	By three-thirteenths of the United States surplus fund as per same statement	446,032.92	
"	By three-sevenths of the Literary fund as per same	647,079.92	
"	By the amount collected in West Virginia after January 1, 1861, as per statement E	328,706.22	2,390,569.06
	Balance due Virginia		$953,360.23

This is the balance as we find it after a protracted examination of such sources of information as were available to us. And the ascertainment of it naturally brings our labors to a conclusion. We commend our investigations to Your Excellency's favorable consideration. From the beginning we realized that the results arrived at must necessarily be only proximate in their character, inasmuch as our sources of information were limited. Subsequent inquiry, under more favorable circumstances, may change the general result a few thousands for or against either State, but such a contingency is of course unimportant. The principle upon which the debt should be adjusted is the important point to settle. And it is to this point, as set forth in these pages, that we beg leave, through Your Excellency, to call the attention of the Legislature.

Very respectfully,
Your Excellency's most obedient servants,

J. J. JACKSON.
J. M. BENNETT.
A. W. CAMPBELL.

Report of the Senate Finance Committee of 1873.

STATE OF WEST VIRGINIA,
CHARLESTON, *December* 22, 1873.

The attention of the Committee on Finance has been repeatedly called by resolutions introduced in the Senate and otherwise, to the subject of Virginia's public debt and the share which it is equitable for West Virginia to bear and pay. The committee under these frequent promptings have been constrained to give the subject their most earnest and careful attention as a matter fraught with more than ordinary consequence to the State, and have come to a conclusion satisfactory to themselves, and it is believed that the conclusion of the committee will be approved by the judgment of the people interested, and will receive the sanction of any tribunal before whom it may be brought for adjudication.

It is necessary to a full understanding of this subject that reference be had to the treaty stipulations or fundamental conditions, by whatsoever name they may be called, between the representatives of the people of Virginia and the people desiring separation, by the creation of a new State, which led to the formation of a constitution, its adoption by the people and its approval by Congress, and the establishment of the State of West Virginia.

The ninth section of "an ordinance to provide for the formation of a new State out of a portion of the territory of this State," (Virginia) passed August 20, 1861, provided, that "the new State shall take upon itself a just proportion of the public debt of the commonwealth of Virginia *prior to the first day of January*, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordi-

nary expenses of the State government since any part of the debt was contracted; and deducting therefrom the monies paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Upon compliance with the conditions contained in the ninth section and here quoted the people within the counties now constituting West Virginia, were authorized to form a constitution to be presented to Congress for its approval and for the admission of the new State into the Union.

Accordingly a constitution was adopted by a convention of the people from the several counties now constituting the State of West Virginia and to carefully guard and secure the rights prescribed by Virginia as a condition precedent to the formation of the new State, a provision was incorporated into it to secure the exact fulfillment of the treaty stipulations as aforesaid.

By article eight, section eight of the constitution, it was provided that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and that the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This subject has received a careful consideration by commissioners appointed by authority of this State, and while this committee see much to approve in the Report of the Debt Commissioners of West Virginia on this subject for their great research and the ability with which they handled the subject, considering the peculiar difficulties under which they labored, as shown in their report, and in the illustration of the many problems that may

rise in the discussion of this subject, yet this committee think the controlling question has not been discussed by the Commissioners by reason of the embarrassment surrounding their action; and the Committee beg leave to refer to the report which is appended hereto and marked No. 1.

In construing the legal principles involved in this matter, it may be assumed that a private creditor of Virginia cannot sue West Virginia for contribution; for that is prohibited by the Constitution of the United States; see article eleven of amendments United States Constitution which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign State." But notwithstanding this prohibition the third article extends the judicial power of the Supreme Court to controversies between two or more States. Under this provision of the Constitution it is within the power of Virginia to institute and prosecute any suit against West Virginia touching the controversies respecting the public debt.

If the conditions precedent to our admission as a State, prescribed by Virginia herself, be accepted as a true basis of adjustment and final settlement, Virginia's claims for expenditures can very properly be offset by our contributions.

Upon this basis the whole subject is one of easy solution, containing no other items than that of creditor or debtor with balances to be struck upon agreed principles. The legislative history of Virginia establishes beyond a doubt that the first act of assembly to create a debt or issue a bond was passed in the year 1821, and the executive records show that the first bond issued by the commonwealth of Virginia was in the year 1822.

From this latter period we date the commencement of our liability under the fundamental stipulations prescribed by Virginia for our separation, which were accepted by the people of this State, approved by Congress, and the President of the United States, as the head of the executive department, and subsequently affirmed by the Supreme Court of the United States, and may at this day be accepted by the public as firmly engrafted into obligations and rights as if the same were constitutional provisions emanating from the supreme power.

The concurrent approval, binding alike upon the people of Virginia and West Virginia, leads us to the following conclusions which are the results of a mathematical demonstration, founded upon public and official records, appropriate to determine how much of the bonded debt of Virginia existing prior to January, 1861, was expended within the limits of this State, and how much was contributed by the counties forming the same.

The report of the Debt Commissioners hereinbefore referred to shows that all State expenditures within this State prior to January, 1861, amounted to $3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.

The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions to as upon the receipts of Virginia.

The committee have therefore assumed the foregoing sum of $3,366.929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the Debt Commissioners aforesaid.

From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia, from the counties included in this State during the same period. For the sake of convenience the committee have charged to Virginia, not the whole contribution, but the surplus after deducting a just proportion of the ordinary expenses of the State government. Our total contributions from taxes to the State of Virginia in the year 1822, amounted to $63,000; and in that year the total of the expenses of the State government chargeable to us was $47,000, leaving an excess of $16,000, which would go to the liquidation of the debt created for expenditures within our midst.

This small surplus in 1822, by the process of an increased rate of taxation, and the increased value of the subjects to be taxed, the rate rising from 8 cents to 40 cents on every one hundred dollars in value, made the excess of our contributions to the treasury of Virginia in the year 1860 amount to $512,000, rejecting fractions.

Thus our contributions to the treasury of Virginia arising from taxes collected in that year amounted to $647,079.96. In the same year our proportion of the ordinary expenses of government amounted to $135,000, which left the surplus aforesaid of $512,079.96. It will be observed that the committee have referred only to the surplus in 1822 and in 1860. The surplus for the intermediate periods swell the aggregate of our contributions to $3,892,000 which is in excess of expenditures within our limits by $525,000.

It will thus be seen that our state is not indebted and the Committee confidently advance this statement, not only as containing the true basis of settlement between the two States, but it is supported by incontrovertible facts, by conditions precedent prescribed by Virginia under the restored govern-

ment which government has been approved as aforesaid by Congress, by the Executive and by by the Supreme Court of the United States.

Notwithstanding the satisfactory condition of our finances and our material resourves, the attention of the committee has been called to the fact that "West Virginia certificates" and "West Virginia bonds" are quoted at the marketable value of from five to fifteen cents on the dollar, in many of the stock exchanges and markets of the United States. This of course has a tendency to depreciate the just credit to which this State is entitled. For it is acknowledged that the credit of a State depends upon the value of its taxable property, the amount of its indebtedness and above all upon its punctuality in meeting its engagements. These quotations imply two things: first, that we owe a debt; second, that we are either unable or unwilling to pay the debt which beget a want of confidence in the minds of the public who are uninformed with respect to the true condition of West Virginia; and operate unjustly and injuriously upon us. It would seem to be enough for us to say, and we make the assertion without the fear of contradiction, that we owe no debt, that we have issued no bonds and our Constitution forbids the creation of a liability in the nature of a public debt; and with this assurance we cannot demand more nor expect less of all honorable stock brokers and bankers than the withdrawal from the list of indebted states the name of West Virginia.

"West Virginia certificates" and "West Virginia bonds" do not exist. No bonds have ever at any time been issued by West Virginia and we are prohibited from issuing at any time hereafter any bonds on the faith of this State. The bonds or certificates referred to were issued by Virginia, and West Virginia had no agency or participation therein.

In respect to the credit which our conduct and property would imply, we might be indifferent, but we have higher aims and more ennobling ambition. We desire to invite immigration, to cultivate our forests and to develop our mineral resources; this cannot be done with success, when men of thrift and capital are deterred from immigrating to and within our borders by reason of the persistent and unjustifiable misquotations of our credit. No one could be expected to invest capital within a State which has so far absorbed the substance of the people thereof that its good faith and obligations were only worth five cents on the dollar. West Virginia owes no debt, has no bonds for sale and asks no credit.

J. M. BENNETT,
Chairman.
JOHN W. GRANTHAM.
A. E. SUMMERS.
J. T. MCCLASKEY.
R. B. SHERRARD.
ELLIOTT VAWTER.

House Joint Resolution No. 10, Concerning the Virginia Debt.

(Adopted February 7th, 1895)

Resolved by the Legislature of West Virginia, That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution.

House Joint Resolution No. 3.

(Adopted January 21, 1897.)

A resolution relating to the Virginia debt question.

Resolved by the Legislature of West Virginia, That it is the sense of this Legislature that West Virginia does not owe one cent of the so called "Virginia debt," and that this Legislature is opposed to any negotiations on that subject.

(H. J. R. No. 6.)

Joint Resolution No. 3.

(Adopted January 21, 1899.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia, That this legislature declines and refuses to take any action in regard to what is known as the Virginia debt, or Virginia deferred certificates, either by considering any propositions of adjustment or settlement, so called, or by authorizing the appointment of any committee or committees having for their purpose the consideration of the same; and that it is the sense of this legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt or certificates.

(S. J. R. No. 2.)

Joint Resolution No. 21.

(Adopted January 16, 1901.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia, That this legislature declines and refuses to take

any action in regard to what is known as the Virginia Debt, or Virginia Deferred Certificates, either by considering any proposition of adjustment for settlement so called, or by authorizing the appointment of any committee or committees, having for their purpose the consideration of the same.

And, That it is the sense of the Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt, or certificates.

(H. J. R. No. 3.)

Joint Resolution No. 3.

(Adopted January 21, 1903.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia, That it is the sense of this legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject. And, *further,* that this legislature declines, and most emphatically refuses, to take any action in regard to what is known as the Old Virginia debt, or Virginia deferred certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee or committees having for their object or purpose the consideration of same; and that it is the sense of this legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt or certificates. Nor do we owe any other state or territory in this Union.

(H. J. R. No. 7.)

Joint Resolution No. 3.

(Adopted January 20, 1905.)

Relating to the Virginia debt.

Resolved by the Legislature of West Virginia, That it is the sense of this legislature that the state of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject.

AN ACT to provide for the defense of the equity suit of the Commonwealth of Virginia against the State of West Virginia, now pending in the Supreme Court of the United States, and appropriate money for such purposes.

Passed February 4, 1907.

Be it enacted by the Legislature of West Virginia:

SEC. 1. That the attorney general of West Virginia be and he is hereby authorized and directed to defend the equity cause of the Commonwealth of Virginia against the State of West Virginia now pending in the Supreme Court of the United States; and the board of public works is hereby authorized to employ such attorneys and agents to assist the attorney general in the defense of such suit as in its judgment shall be necessary for the purpose.

SEC. 2. The attorney general is further authorized and directed to have made as soon as possible such searches and investigations as may be neces-

sary to ascertain all the facts, which in his opinion, are needed for the proper defense of said suit; and the attorney general is further authorized, if in his opinion it is necessary, to request of the officers of the said Commonwealth of Virginia reasonable access to the records of said Commonwealth so far as it may be necessary for such purpose; and to cause such copies and extracts of such records made as he or his associates may deem necessary for such purpose; and the attorney general is directed to make full and complete reports of his acts hereunder to the board of public works, from time to time, as he may deem proper or as requested by said board, and to the legislature at each session thereof during the pendency of this suit.

SEC. 3. To carry out the provisions of this act, the sum of fifty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be paid out of the treasury from time to time on the requisition of the board of public works.

SCHEDULE 2.

Paragraph XI of West Virginia's Answer, Pages 10-15, Inclusive.

XI.

This respondent for further answer to said bill says that she denies that the Commonwealth of Virginia made attempts at different times to ascertain and settle the equitable proportion of her public debt to be borne by West Virginia, upon the terms and in the manner contemplated by section nine of the ordinance adopted by the convention of the State of Virginia on the 20th day of August, 1861, in section eight of Article VIII of the Constitution of West Virginia, or in the manner prescribed by either of said instruments. The facts relating to the efforts of the Commonwealth of Virginia and the State of West Virginia to make an adjustment of the liability of the latter State, if any such liability exists, between the year 1865, when communication between the two States was re-established, and the year 1872, are as follows:

Prior to December, 1866, the Commonwealth of Virginia instituted a suit in equity against the State of West Virginia in this Honorable Court for a decision of the question whether or not the counties of Berkeley and Jefferson constituted a part of the State of West Virginia. This cause was not determined until the 6th day of March, 1871, on which day it was decided in favor of West Virginia. The effect of the pendency of this suit for over four years was to prevent a satisfactory adjustment of West Virginia's liability for the payment of an equitable proportion of the public debt of Virginia as provided in said ordinance of the Wheeling Convention because of the fact that

West Virginia's boundaries could not be known and therefore it could not be determined what amount of money had been expended within her limits for public works or other purposes prior to the 1st day of January, 1861.

Respondent avers that the Governor of West Virginia in his message to the legislature in January, 1866, recommended that Commissioners be appointed to settle with the commonwealth of Virginia respecting the said public debt; but no action was taken by the legislature of West Virginia of 1866 for the reason that the authorities of Virginia had made, at that time, no provision for a settlement, so far as was known to the authorities of West Virginia.

In his message to the legislature of West Virginia in 1867, the Governor again directed the attention of that body to the subject of the adjustment of the said public debt, stating that he was informed that Honorable Alexander H. H. Stuart of Virginia, together with two others, had been appointed under a resolution adopted by the General Assembly of Virginia: First for the purpose of securing a reunion of the two States, or secondly, for the purpose of adjusting the public debt and for a fair division of the public property. On the 28th day of February of the same year, the legislature of West Virginia by resolution declared that the people of that State were unalterably opposed to a reunion with the people of the commonwealth of Virginia, but expressed the willingness of the citizens of West Virginia to effect a prompt and equitable settlement between the States and directed the Governor as soon as the said suit in the Supreme Court of the United States, relating to the counties of Berkeley and Jefferson, had been disposed of, to appoint three commissioners on the part of West Virginia to treat with the commissioners of Virginia upon the matter of adjusting

the public debt of that State as provided in the ordinance of 1861, and the Constitution of West Virginia, adopted by the convention which assembled in November, 1861, and also requiring a report of their action to the Governor in order that the same might be communicated to the legislature of West Virginia for its action.

In January, 1868, the Governor of West Virginia informed the legislature in his annual message that the commissioners had not been appointed under the resolution because the suit in relation to the counties of Berkeley and Jefferson had not been disposed of. But in February of that year the Committee on Claims and Grievances of the House of Delegates, upon the petition of one of Virginia's creditors asking that the State of West Virginia provide for the payment of certain bonds of the State of Virginia of which he claimed to be the bona fide holder, reported that the settlement of West Virginia should be with the State of Virginia and not with the creditors of Virginia. And again in his message of 1869 to the Legislature of West Virginia the governor referred to the subject of the settlement of the public debt of Virginia and stated that commissioners had not been appointed by him up to that time owing to the fact that the suit between the States was still pending. The State of Virginia having, by an act approved February 18, 1870, provided for the appointment of three commissioners to treat with the authorities of the State of West Virginia, the governor of West Virginia, by communication dated February 24, 1870, advised the Legislature of West Virginia of the passage of that act by Virginia, and thereupon the Legislature of West Virginia, on the 1st day of March, 1870, appointed a joint committee of the two Houses of the Legislature to confer with the Virginia Commissioners and report to the Legislature, provided, however, that

such appointment of commissioners should not in any manner prejudice the rights of West Virginia involved in the suit in equity brought against her by the commonwealth of Virginia as hereinbefore stated, which was still pending in this court.

Afterwards, on March 3, 1870, the governor of West Virginia was authorized by the Legislature to appoint three resident citizens of the state to treat with the authorities of the Commonwealth of Virginia upon the subject of the proper adjustment of the public debt of that State, but it was provided that nothing in that action was to be construed as impairing the jurisdiction of West Virginia over the counties of Berkeley and Jefferson; but as there was an omission to make an appropriation to pay the expenses of West Virginia's commissioners, and the resolution authorizing their appointment was passed on the last day of the session of the Legislature, the Governor of West Virginia again in his message of 1871 stated that no appointment had been made owing to the lack of funds to pay the expenses of such commission.

Pending the efforts thus being made on the part of West Virginia, the general assembly of Virginia, on February 20, 1871, through the Governor of that State, tendered to West Virginia a proposition for an arbitration of the question relating to the public debt of that State, the arbitrators not to be citizens of either State, each State to appoint two arbitrators and the two to select an umpire if deemed necessary. This proposal made by the Commonwealth of Virginia was submitted to the Legislature of West Virginia on the 17th day of February, 1871, but on the 15th day of February, 1871, two days prior to the communication of this action of the General Assembly of Virginia, the Legislature of West Virginia had passed a joint resolution authorizing the Governor to appoint three disinterested citizens of the State to treat

with the authorities of the Commonwealth of Virginia upon the subject of the adjustment of the public debt of that State existing prior to the 1st day of January, 1861, to report on various matters relating to the creation of the debt; upon the investments held by the State of Virginia, and, providing, among other things, compensation for the commissioners and for the employment of an accountant or clerk.

The proposal of Virginia relating to arbitration was referred by the Legislature of West Virginia to a joint special committee of the two Houses, which committee reported a preamble and joint resolution rejecting the tender of arbitration made by the Governor of Virginia because the adjustment of the debt should be subject to the ratification of the legislatures of the two States and because citizen commissioners from both States would be necessarily more familiar with the circumstances attending the creation of the said debt and other questions connected therewith. The said joint resolution also invited the Commonwealth of Virginia to appoint three disinterested citizens of that State as commissioners, with authority to treat with the commissioners, theretofore authorized upon the part of West Virginia; but it was provided that their report should be subject to the approval and ratification of the legislature of the State of West Virginia and the General Assembly of the Commonwealth of Virgina; and the Governor of West Virginia was also directed by said resolution to communicate to the Governor of Virginia, without delay, certified copies of the preamble and resolution. Accordingly, in pursuance of this resolution, the Governor of West Virginia appointed three commissioners to negotiate with the State of Virginia for a settlement of West Virginia's equitable part of the public debt. After their appointment the said commissioners pro-

ceeded to Richmond, where all the accounts, vouchers and other evidences of the receipt and expenditure of the money were kept, and there spent some time in the examination of such documents as were accessible, but realizing the necessity for further and more accurate information than they could obtain unassisted, they addressed a communication to the second auditor of the Commonwealth of Virginia soliciting specifically the necessary information. To this request on the part of the Commissioners of West Virginia, the said second auditor made a reply in which he declined to furnish the information desired, a copy of which reply is herewith filed as "Exhibit No. 2" and made a part of this answer.

The failure and refusal of Virginia to co-operate with the said commissioners placed them at a great disadvantage in the examination of the records at Richmond, and they therefore obtained only such facts and figures as to enable them to make an imperfect report to the Governor of the State of West Virginia with reference to said public debt, showing the part of said public debt for which, in their opinion, according to such information as they could procure, West Virginia was liable.

Respondent avers that by reason of the inability of said commissioners to procure from the State of Virginia the necessary information concerning the public debt and other matters connected therewith, their report was not only very incomplete and inaccurate, but it appeared therefrom, that in making their investigations they wholly disregarded the provisions of the ordinance of the Wheeling Convention adopted August 20, 1861, and did not follow the method of settlement therein prescribed and respondent avers that for these and other reasons the conclusions of said commissioners were not agreed to or accepted by the Legislature of West Virginia; but subsequently the Senate of West Virginia proceeded to

make an investigation of the subject through its Finance Committee, of which J. M. Bennett, who was for eight years auditor of the old State of Virginia, and whose time expired when the city of Richmond was evacuated in 1865, was chairman. Said committee made a report on the 22nd day of December, 1873, from which it appeared that the State of West Virginia upon a settlement with the Commonwealth of Virginia based upon the provisions of section nine of the ordinance passed by the commonwealth of Virginia at the Wheeling Convention, did not owe to the said Commonwealth of Virginia anything whatever, but that, on the contrary, the said Commonwealth was indebted to West Virginia on account of said debt on the 1st day of January, 1861, in the sum of $512,000, not including interest. A copy of said report is filed herewith, and made a part hereof as Exhibit 3.

The State of West Virginia has never receded from the provisions contained in section nine of the Wheeling Ordinance with reference to the settlement of this respondent's just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a State; and the resolutions adopted by her Legislature in recent years in which she declared that she did not owe the State of Virginia anything on account of said public debt were based upon the said report of the Senate Committee made in 1873 as aforesaid, and upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance as the just and true one upon which a settlement between the two States could legally and equitably be made.

After the proposition of the Commonwealth of Virginia to select arbitrators, which was declined by the State of West Virginia as hereinbefore stated the said Commonwealth of Virginia at no time signified her desire to settle with West Vir-

ginia the matters relating to West Virginia's proportion of said public debt until the adoption of a joint resolution approved March 6, 1894, after she had compromised and settled with her creditors and been released from all liability, which resolution provided for the appointment of a commission of seven members who were thereby authorized and directed to negotiate with the State of West Virginia for a settlement and adjustment of the latter State's part of the public debt proper to be borne by her, but which also expressly provided that such commission should not proceed with such negotiations until assurances should be received from the holders of a majority in amount of the certificates issued by Virginia under the acts hereinafter referred to, that they desired the said commission to enter into and undertake such negotiations and would accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State which had not been assumed by the State of Virginia; and it was also provided in said resolution that in no event should said commission enter into negotiations except upon the basis that Virginia was bound only for the two-thirds of the debt of the original State and which, as recited in said resolution she had already provided for as her equitable proportion thereof. Under the aforesaid resolution no negotiations were proposed to West Virginia until the year 1895 and then only upon the conditions prescribed in the joint resolution of 1894, which has never yet been repealed or modified in this respect; and negotiations were again offered by Virginia in 1906 but upon the same condition, that West Virginia should enter upon such negotiations with the admission on her part that the said Commonwealth of Virginia should only be liable for two-thirds of said debt, which was again declined by the said State of West Virginia.

SCHEDULE 3.

Pages 12-20, Inclusive, of West Virginia's Brief Upon the Hearing on the Merits Upon the Report of the Special Master.

Virginia Sought No Adjustment with West Virginia of Any Part of the Public Debt as Alleged in Her Bill.

With reference to the efforts at settlement between the two States touching the public debt, the bill makes this averment:

> "After the year 1865, and prior to the year 1872, attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settling of any kind was ever had between the two States in regard to this debt."
>
> Record, p. 10.

The answer of the defendant to this paragraph of the bill appears in the record at pages 149-154. The facts in relation to this matter are as follows:

The first governor of West Virginia, the Hon. Arthur I. Boreman, in his first message to the first legislature of that State, in discussing the financial condition and prospects of the new State, said:

> "The constitution provides that this State shall assume an equitable proportion of the debt of Virginia, prior to the first day of January, 1861, but no settlement can be made at present, and when it is made our 'equitable proportion' cannot be much."

In his message, dated January 16, 1866, to the legislature of that year, Governor Boreman, after quoting section 8 of article 8 of the constitution of West Virginia, says that the execution of this provision of the constitution had theretofore been impracticable on account of the existence of the war, but now that the war is over and peace is restored, he recommended the appointment of commissioners on behalf of the State to meet a like commission from Virginia.

Prior to December, 1866, Virginia instituted a suit in equity against the State of West Virginia in this Honorable Court for a decision of the question whether or not the counties of Berkeley and Jefferson constituted a part of the State of West Virginia. This cause was not determined until the 6th day of March, 1871, on which day it was decided in favor of West Virginia. During pendency of this suit no adjustment of West Virginia's liability, as provided in the ordinance, could be made, because until the boundaries of West Virginia were definitely determined it could not possibly be known what (1) amount of money was spent within the boundaries as State expenditures, (2) what her just proportion of the expenses of the State government was, nor (3) the amount paid into the State treasury from her counties, as provided by the ordinance.

In his message to the legislature of 1867, Governor Boreman refers to his recommendation of the appointment of commissioners, made in last message, to meet commissioners from the State of Virginia, and States that it had not been done because the authorities of Virginia had made no provision for such settlement. He states that he was informed that the Honorable Alexander H. H. Stuart of Virginia, together with two others, had been appointed under a resolution adopted by the general assembly of Virginia; first, for the pur-

pose of securing a reunion of the two States, or secondly, for the purpose of adjusting the public debt and for a fair division of the public property. On February 28 of the same year, the legislature of West Virginia by resolution declared that the people of that State were unalterably opposed to a reunion with the people of Virginia, but expressed the willingness of West Virginia to effect a prompt and equitable settlement between the two States, and directed the Governor as soon as the said suit in the Supreme Court of the United States relating to the counties of Berkeley and Jefferson had been disposed of, to appoint three commissioners on the part of West Virginia to treat with commissioners of Virginia upon the matter of adjusting the public debt as provided in the ordinance of 1861 and the constitution of West Virginia (W. Va. Compilation, vol. 1, pp. 444-6).

In January, 1868, the governor of West Virginia informed the legislature in his annual message, that the

> "Commissioners to treat with Virginia in regard to the public debt of that State, have not yet been appointed under the resolutions of that subject adopted by the legislature, February 28, 1867. The resolutions prescribe that the suit brought by Virginia in the Supreme Court of the United States, to recover jurisdiction over the counties of Berkeley and Jefferson, shall be finally disposed of before such appointment shall be made, which event has not yet transpired; and, if it had, there might still be a question whether such settlement should take place in the present condition of affairs in Virginia."

The "present condition of affairs in Virginia" referred to was doubtless that arising out of the

anomalous situation caused by the refusal of Congress to admit representatives from Virginia, from December, 1865, until the State was re-admitted into the Union in 1870. Congress, it appears, refused to recognize as valid the legislature that assembled under the Alexandria constitution of Virginia. Later, the State was placed under military government; a new constitution was adopted in 1868, ratified by the people in July, 1869, and Virginia re-admitted into the Union January 26, 1870. No negotiations could properly or safely have been carried on with Virginia during this period of "reconstruction," even if the suit to recover Berkeley and Jefferson counties had not been pending.

Again, in his message in 1869 to the legislature of West Virginia, the governor stated that commissioners had not been appointed by him up to that time, owing to the fact that the suit between the States was still pending. Virginia having, by an act approved February 18, 1870, provided for the appointment of three commissioners to treat with the authorities of West Virginia, the Governor of West Virginia, by communication dated February 24, 1870, advised the legislature of West Virginia of the passage of that act; and thereupon the legislature of West Virginia, March 1, 1870, appointed a joint committee of its two houses to confer with the Virginia commissioners and report to the legislature, providing, however, that such appointment of commissioners should not in any manner prejudice the rights of West Virginia involved in the suit then still pending in this court respecting the counties of Berkeley and Jefferson (W. Va. Comp., vol. 1, pp. 446-7).

On March 3, 1870, the Governor of West Virginia was authorized by the legislature by joint resolution to appoint three resident citizens of the State, to treat with the authorities of Virginia upon the subject of the public debt of that State,

but it was provided that nothing in that action was to be construed as impairing the jurisdiction of West Virginia over the counties of Berkeley and Jefferson (W. Va. Comp., vol. 1, pp. 447-8). As the resolution was passed on the last day of the session, and as there was omission to make appropriation of money to carry out its provisions, the Governor of West Virginia, in his message of 1871, stated that no appointment had been made owing to the lack of funds to pay the compensation and expenses of such commission.

Pending the efforts thus being made on the part of West Virginia, the general assembly of Virginia, through the governor of that State, tendered to West Virginia a proposition for an arbitration of the question relating to the debt, the arbitrators not to be citizens of either State, each State to appoint two, and an umpire to be chosen by the arbitrators if deemed necessary. This proposal was submitted to the legislature of West Virginia on February 17, 1871; but on the 15th, two days prior to the communication of this action of Virginia, the legislature of West Virginia had passed a joint resolution, authorizing the governor to appoint three disinterested citizens of the State to treat with the authorities of Virginia upon the subject of the adjustment of the public debt of that State existing prior to January 1, 1861, to report on various matters relating to the creation of the debt, upon the investments held by the State of Virginia, and, providing, among other things, compensation for the commissioners and for the employment of an accountant or clerk (W. Va. Comp., vol. 1, pp. 448-9).

The proposal of Virginia relating to arbitration was referred by the legislature of West Virginia to a joint special committee of the two houses, which committee reported a preamble and joint

resolution, rejecting the tender of arbitration because the adjustment of the debt should be subject to the ratification of the legislature of the two States, and because citizen commissioners from the two States would be necessarily more familiar with the circumstances attending the creation of the said debt and other questions connected therewith. This joint resolution also invited Virginia to appoint three disinterested citizens of that State as commissioners, with authority to treat with the commissioners theretofore authorized upon the part of West Virginia; but it was provided that their report should be subject to the approval and ratification of the legislature of the State of West Virginia and the general assembly of the commonwealth of Virginia. The Governor of West Virginia was directed by said resolution to communicate to the Governor of Virginia, without delay, certified copies of the preamble and resolution (W. Va. Comp., vol. 1, pp. 449-54). Accordingly, the Governor of West Virginia appointed three commissioners for the purpose aforesaid. This commission is known as the "West Virginia Debt Commission of 1871." After their appointment they proceeded to Richmond, where all the evidences of the receipt and expenditure of the money were kept, and there spent some time in the examination of such documents as were accessible. Realizing the necessity for further and more accurate information than they could obtain unassisted, they addressed a communication to the second auditor of Virginia, soliciting specifically the necessary information. To this request the second auditor made a reply, in which he declined to furnish the information desired, a copy of which reply is filed as "Exhibit No. 2" of defendant's answer (R., p. 166).

Soon after their appointment the commission addressed a letter to the Governor of Virginia,

notifying him of their appointment, their organization, and the duties put upon them, and requesting him to indicate at his earliest convenience what "channel of communication will be open to us." Nearly a month later they received from the Governor of Virginia a copy of a letter from him to the Governor of West Virginia, declining to recognize the West Virginia commissioners (W. Va. Comp., vol. 1, pp. 457-9). A few weeks later, in his message to the legislature, the Governor of Virginia "proceeds," to quote the language of the West Virginia Debt Commission, "to asperse the good faith of the State of West Virginia" (W. Va. Comp., vol. 1, p. 463). Having failed in their effort to obtain either the recognition or the co-operation of the governor or the second auditor of Virginia, the commission left Richmond, because, as they say in their report, "further stay was not likely to add to the scant information already gleaned by them from the public documents" (W. Va. Comp., vol. 1, p. 462).

The failure and refusal of Virginia to recognize, receive, or co-operate with the commissioners placed them at a great disadvantage, and they therefore obtained only such facts and figures as enabled them to make an imperfect report to the Governor of West Virginia with reference to the matters with which they were charged; and because of the incompleteness and inaccuracy of their report, and because it appeared therefrom, that in making their investigations they wholly disregarded the provisions of the ordinance of the Wheeling convention adopted August 20, 1861, and did not follow the method of settlement therein prescribed, their report was not adopted by the legislature of West Virginia. In 1873, the Senate of West Virginia made an investigation of the subject of the debt, through its finance committee, of

which J. M. Bennett, who was for eight years auditor of the old State of Virginia, and whose time expired when the city of Richmond was evacuated in 1865, was chairman. This committee made a report on December 22, 1873, from which it appeared that West Virginia upon a settlement with Virginia, based on the provisions of section nine of the ordinance, did not owe to Virginia anything whatever, but that, on the contrary, Virginia was indebted to West Virginia on account of said debt on January 1, 1861, in the sum of $512,000, not including interest. A copy of this report is printed in the record at page 166, as Exhibit 3 of defendant's answer.

A few weeks after the West Virginia Debt Commission of 1871 retired from Richmond after their fruitless endeavors there for recognition and cooperation, and after the Governor of Virginia had, in his message to the general assembly, questioned the good faith of West Virginia, Virginia passed her first funding act, that of 1871, in which she assumed two-thirds of the amount of the debt as her full share, and, *in violation and repudiation of section nine of the ordinance* of August 20, 1861, arbitrarily set aside the other one-third as West Virginia's portion. This is the more remarkable when it is remembered that she refers to and quotes from said section nine of the ordinance in the preamble of this act (R., p. 18). And to the same effect were the funding acts of 1879, 1882, and 1892. The joint resolution of the general assembly of Virginia, approved March 6, 1894, to provide for adjusting the portion of the debt to be borne by West Virginia, and creating the Virginia Debt Commission, provides (R., p. 49):

> "But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only

> for the two-thirds of the debt of the original State which she has already provided for as her equitable proportion thereof."

And the act of the general assembly of Virginia, approved March 6, 1900, is to the same effect, namely, that Virginia is liable for two-thirds only of the debt as her part thereof, which she has already provided for.

West Virginia, since the passage of the funding act of 1871—certainly since the adoption of the joint resolution of 1894,—could enter upon negotiations with Virginia upon no other basis. West Virginia must agree, as a preliminary to any such negotiations with Virginia, that Virginia was liable for two-thirds only of the debt, that this was her "equitable proportion," and that she has settled that. And what besides would it be held that West Virginia recognized or admitted or agreed to had she entered into negotiations with Virginia on such basis? This, that she had recognized that she was liable for the other third as *her* "equitable proportion;" for, it would be reasoned, that since it takes three-thirds to make a whole, and as Virginina was liable for two-thirds only, West Virginia must be liable for the other third. It is and was not reasonable to ask that West Virginia should place herself in such a position, especially as it would have set aside the agreement West Virginia made with reference to her portion of the debt and the method of ascertaining the same, contained in section nine of the ordinance.

West Virginia has never receded from the said provisions of the ordinance with reference to the settlement of her just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a State. The resolutions adopted by her legislature in recent years, in which she declared that she did not owe

the State of Virginia anything on account of said debt, and would not negotiate with her concerning the same, were based upon the said report of the finance committee of 1873, upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance, and upon the conditions of negotiations dictated by Virginia in her said joint resolution of 1894 and said act of 1900.

After the said proposition of Virginia, made in 1871, to select arbitrators, which was declined by West Virginia, as hereinbefore stated, Virginia at no time signified her desire to settle with West Virginia the matters relating to West Virginia's proportion of said public debt, until after the adoption of said joint resolution approved March 6, 1894, whereby she had compromised and settled with her creditors and been released from all liability, which resolution provided that the commission thereby created should not proceed with negotiations with West Virginia until assurances should be received from the holders of a majority in amount of the certificates issued by Virginia under her funding acts, hereinbefore referred to, that they desired the commission to undertake such negotiations and would accept the amount so ascertained to be paid by West Virginia in full settlement of the one-third of the debt of the original State which had not been assumed by Virginia; and also that in no event should said commission enter into negotiations except upon the basis that Virginia was bound only for the two-thirds of the debt of the original State and which she had already provided for as her equitable proportion thereof. Under this resolution no negotiations were proposed to West Virginia until the year 1895, and then only upon the conditions prescribed in said joint resolution of 1894, which has never yet been repealed or modified in this respect.

Negotiations were again offered by Virginia in 1906, but upon the same condition, that is, that West Virginia should enter upon such negotiations with the admission on her part that Virginia should be liable for two-thirds only of the debt, which was again declined by West Virginia.

It will be clearly seen, therefore, that the allegations in the bill that "attempts were made at different times by the public authorities of both the commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportion of the common liability," is not supported to the extent and effect sought to be shown by the bill filed in this case.

It is averred in the bill that it was soon apparent that Virginia had by the act of March 6, 1871, assumed a heavier burden than she was able to bear, and other plans for the settlement of the debt were attempted to be made by the action of the General Assembly on March 28, 1879, and February 14, 1882, until at length, it is alleged, that a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the act of February 20, 1892. See R., pp. 21-47. Virginia files with her bill copies of each of these acts of her General Assembly as Exhibits Nos. 2, 3, and 4. It is also shown by the bill that Virginia, by her act of March 30, 1871, sought to fix her liability upon the basis of two-thirds of the original debt, and it is alleged that this was the intention of that act.

SCHEDULE 4.

INDEX TO THE METHOD OF COMPUTING INTEREST ON WEST VIRGINIA'S SHARE OF THE DEBT AS IT EXISTED JANUARY 1, 1861.

	Total bonds outstanding.	In literary and sinking funds and in the hands of Board of Public Works.	Net amount.
Group 1—6's	$9,729,326.36	$772,055.33	$8,957,271.03
2—5's	452,209.00	190,200.00	262,000.00
3—6's	350,000.00	254,500.00	95,500.00
4—6's	125,393.27	18,680.02	106,713.25
5—6's	8,861,864.33	773,689.18	8,088,175.15
6—6's	13,082,500.00	.....	13,082,500.00
7—6's	1,059,500.00	547,000.00	512,500.00
8—5's	1,815,204.50	.....	1,815,204.50
5's	5,000.00	5,000.00	.....
Total	$35,480,988.46	$2,561,124.53	$32,919,863.93
Accrued interest January 1, 1861			977,209.89
Total debt			$33,897,073.82
West Virginia's proportion			7,182,567.46
West Virginia's proportion, per cent of total debt			21.2%

Group 1—6% registered bonds redeemable at the pleasure of the General Assembly $8,957,271.03

Interest upon West Virginia's share of these bonds is computed from January 1, 1861, to January 1, 1913.

Group 2—5% registered bonds redeemable at the pleasure of the General Assembly 262,000.00

Interest upon West Virginia's share of these bonds is computed from January 1, 1861, to January 1, 1913.

Group 3—6% annuity on old James River stock 95,500.00

Interest upon West Virginia's share of this annuity is computed from January 1, 1861, to January 1, 1913.

Group 4—6% registered bonds redeemable in 20 years 106,713.25

No interest is charged against West Virginia on her share of these bonds.

Group 5—6% registered bonds redeemable in 34 years 8,088,175.15

Interest upon West Virginia's share of the bonds, each of the four loans listed in this group, is computed from January 1, 1861, to a date 34 years after the date of the act authorizing such issue.

Group 6—6% coupon bonds redeemable in 35 years 13,082,500.00

The interest upon West Virginia's share of these bonds is computed from January 1, 1861, to March 29, 1886, being 35 years after March 29, 1851, the date of the act authorizing this issue.

Group 7—6% registered bonds in lieu of coupon bonds redeemable in 35 years 512,500.00

Interest upon West Virginia's share of these bonds is computed from March 29, 1886, being 35 years after March 29, 1851, the date of the first act authorizing issue of coupon bonds for which these bonds were exchanged.

Group 8—5% sterling coupon bonds redeemable in 35 years 1,815,204.50

Interest upon West Virginia's share of these bonds is computed from January 1, 1861, to March 29, 1886, being 35 years after March 29, 1851, the date of the act authorizing this issue.

GROUP 1.

6% Registered Bonds Redeemable at Pleasure of General Assembly.

	Amount
Alleghany & Huntersville Road	$2,700.00
Alexandria Canal Co	232,400.00
Berryville & Charlestown Turnpike Co	6,400.00
Beverly & Fairmount Road	16,600.00
Blue Ridge Railroad Co	32,200.00
City Point Railroad Co	49,600.00
Charlestown & Point Pleasant Turnpike Co	20,800.00
Charlestown & Point Pleasant Turnpike Co	5,800.00
Cacapon & North Branch Turnpike Co	11,000.00
Cumberland Gap Road	61,600.00
Clarkburg & Buckhannon Turnpike Co	8,000.00
Coal River Navigation Co	4,000.00
Dismal Swamp Canal Co	16,500.00
Dragon Swamp Navigation Co	1,464.00
Exchange Bank of Virginia and Northwestern Bank of Virginia	440,257.00
Giles Fayette & Kanawha Turnpike Co	9,000.00
Goose Creek & Little River Navigation Co	7,000.00
Holliday Cove Turnpike Co	4,700.00
Hardy & Winchester Turnpike Co	15,500.00
Howardsville & Rockfish Turnpike Co	5,000.00
Hampshire & Morgan Turnpike Co	4,600.00
Ice's Ferry Road	1,358.00
Bank of Virginia	97,800.00
James River & Kanawha Co	1,773,431.59
James River & Kanawha Co	229,034.00
James River & Kanawha Co	1,205,100.00
James River & Kanawha Co	106,350.00
Louisa Railroad Co	166,150.00
Louisa Railroad Co	126,987.00
Louisa Railroad Co	12,900.00
Lewisburg & Blue Sulphur Springs Turnpike Co	1,000.00
Lafayette & English Ferry Turnpike Co	2,550.00
Lynchburg & Buffalo Springs Turnpike Co	8,500.00
Little Stone Gap Road	3,000.00
Marshall & Ohio Turnpike Co	9,000.00
Moorefield & North Branch Turnpike Co	10,700.00
Morgantown & Bridgeport Turnpike Co	1,040.00
Moorefield & Alleghany Turnpike Co	3,600.00
Natural Bridge Turnpike Co	6,100.00
North Carolina & Wytheville Road	100.00
North Western Turnpike Road	53,850.00
North Western Turnpike Road	6,600.00
North Western Turnpike Road	2,000.00
North Western Turnpike Road	5,904.73
North Western Turnpike Road	2,100.00
Newmarket & Sperryville Turnpike Co	9,100.00
Ohio River & Maryland Line Road	12,000.00
Ohio River & Maryland Line Road	6,600.00
Orange & Alexandria Railroad Co	108,200.00
Petersburg Railroad Co	147,580.00
Portsmouth & Roanoke Railroad Co	64,950.00
Portsmouth & Roanoke Railroad Co	50,000.00
Pittsylvania, Franklin & Botetourt Turnpike Co	9,090.10

Richmond & Petersburg Railroad Co	175,900.00
Richmond & Petersburg Railroad Co	49,700.00
Rappahannock Co	12,900.00
Rappahannock Co	95,000.00
Red & Blue Sulphur Springs Turnpike Co	4,900.00
Rivanna Navigation Co	6,000.00
Richmond & Danville Railroad Co	378,000.00
Richlands to Kentucky Line Road	3,520.00
Rocky Mount Turnpike Co	9,800.00
Rich Patch Turnpike Co	1,100.00
Staunton & Parkersburg Road	1,900.00
Staunton & Parkersburg Road	16,510.00
Salem & Pepper's Ferry Turnpike Co	4,900.00
Salem & Newcastle Turnpike Co	3,875.00
South Western Turnpike Road	71,970.00
South Western Turnpike Road	123,162.00
Smiths River Navigation Co	2,600.00
Tazewell Court House and Fancy Gap Road	3,420.00
Upper Appomattox Co	37,900.00
Valley Turnpike Co	232,413.00
Valley Turnpike Co	22,664.00
Virginia & Maryland Bridge Co	8,200.00
Virginia, Tennessee Railroad Co	66,800.00
Winchester & Potomac Railroad Co	133,935.00
Wheeling, West Liberty & Bethany Turnpike Co	8,467.61
Weston & Fairmount Turnpike Co	4,000.00
Weston & Gauley Bridge Turnpike Co	5,000.00
Wellsburg & Bethany Turnpike Co	1,700.00
Williamsport Turnpike Co	800.00
Registered bonds	2,272,348.00
	$262,000.00

Elapsed time from January 1, 1861, to October 1, 1913 = 52 years, 9 months.

West Virginia's share, computed at 21.2% of the above	$1,898,941.46
Interest on West Virginia's share	6,010,149.72

GROUP 2.

5% Registered Bonds Redeemable at Pleasure of General Assembly.

Portsmouth & Roanoke Railroad Co	$104,000.00
Portsmouth & Roanoke Railroad Co	100,000.00
Richmond, Fredericksburg & Potomac R. R. Co	5,000.00
Winchester & Potomac Railroad Co	8,000.00
	$262,000.00

Elapsed time from January 1, 1861, to October 1, 1913 = 52 years, 9 months.

West Virginia's share, computed at 21.2% of the above	$55,544.00
Interest on West Virginia's share	146,497.30

GROUP 3.

JAMES RIVER ANNUITY, 6%.

James River Co.	$95,500.00

Elapsed time from January 1, 1861, to October 1, 1913 = 52 years, 9 months.

West Virginia's share, computed at 21.2% of the above	$20,246.00
Interest on West Virginia's share	64,078.59

GROUP 4.

6% REGISTERED BONDS REDEEMABLE IN 20 YEARS.

Staunton & Parkersburg, Loan No. 16, act of March 16, 1838	$106,713.25

No interest charged to West Virginia on this loan.

West Virginia's share, computed at 21.2% of the above	$22,623.21

GROUP 5.

6% REGISTERED BONDS REDEEMABLE IN 34 YEARS.

James River & Kanawha Co., act March 23, 1860	$2,492,400.00		
West Virginia's proportion @ 21.2%		$528,388.80	
Interest on West Virginia's share from January 1, 1861, to March 23, 1894			$1,053,332.51

Being 34 years after March 23, 1860, the date of the act authorizing this issue. Elapsed time, 33 years, 82 days.

(Loan No. 91.)

Registered bonds issued for redemption of warrants, act March 17, 1856	2,698,700.00		
West Virginia's proportion @ 21.2%		572,124.40	
Interest on West Virginia's share from January 1, 1861, to March 17, 1890			1,002,642.29

Being 34 years after March 17, 1856, the date of the act authorizing this issue. Elapsed time, 29 years, 76 days.

(Loan No. 93.)

Registered bonds, act March 18, 1858	398,900.00		
West Virginia's proportion @ 21.2%		84,566.80	
Interest on West Virginia's share from January 1, 1861, to March 18, 1892			158,364.86

Being 34 years after March 18, 1858, the date of the act authorizing this issue. Elapsed time, 31 years, 77 days.

(Loan No. 90.)

Registered bonds (coupons attached), Acts March 29, 1851 } May 25, 1852.. }	2,498,175.15		
West Virginia's proportion @ 21.2%		529,613.13	
Interest on West Virginia's share from January 1, 1861, to March 29, 1885			770,306.41

Being 34 years after March 29, 1851, the date of the first act authorizing this issue. Elapsed time, 24 years, 88 days.

Totals	$8,088,175.15	$1,714,693.13	$2,984,656.07

GROUP 6.

6% Coupon Bonds Redeemable in 35 Years.

Coupon bonds, act of March 29, 1851	$13,082,500.00

Elapsed time from January 1, 1861, to March 29, 1886—25 years, 88 days. Being 35 years after March 29, 1851, the date of the act authorizing this issue.

West Virginia's share, computed at 21.2% of the above	$2,773,490.00
Interest on West Virginia's share	4,200,367.40

GROUP 7.

6% Registered Bonds Redeemable in 35 Years.

(Loan No. 92.)

Registered bonds in exchange for coupon bonds, act of March 18, 1856	$512,500.00

West Virginia's share, computed at 21.2% of the above	$108,650.00
Interest on West Virginia's share	164,547.17

GROUP 8.

5% STERLING COUPON BONDS REDEEMABLE IN 35 YEARS.

Sterling coupon bonds, act of March 29, 1851	$1,815,204.50
West Virginia's share, computed at 21.2% of the above	$384,823.35
Interest on West Virginia's share	485,666.31

SUMMARY.

	Net total amount of bonds outstanding.	Amount chargeable to West Virginia @ 21.2%.	Interest on West Virginia's share.
Group 1	$8,957,271.03	$1,898,941.46	$6,010,149.72
2	262,000.00	55,544.00	146,497.30
3	95,500.00	20,246.00	64,078.59
4	106,713.25	22,623.21	.....
5	8,088,175.15	1,714,693.13	2,984,656.07
6	13,082,500.00	2,773,490.00	4,200,367.40
7	512,500.00	108,650.00	164,547.17
8	1,815,204.50	384,823.35	485,666.31
	$32,919,863.93	$6,979,011.15	$14,055,962.56

SCHEDULE 5.

West Virginia Debt. The Amount West Virginia Should Pay on the Various Bases Shown in Point Seven.

BASIS—PAYMENTS MADE BY VIRGINIA ON ACCOUNT OF HER SHARE OF THE DEBT.

	From Exhibit No. 7 of the plaintiff's bill.	Estimated amounts accrued since 1906.	[Estimated] Oct. 1, 1913.
Interest paid	$35,551,642.82 to Feb. 1, 1906.	$6,300,000.00 to Feb. 1, 1913, about	$41,850,000.00
Bonds taken up	10,771,791.49 to Sept. 30, 1905	1,328,100.00 to July 14, 1913	12,099,891.49
New bonds issued and outstanding	25,537,820.00 1905 report	*1,153,907.73	24,383,912.27
Total paid out by Virginia—about	71,861,253.31	.....	78,333,803.76

* Deduct.

The court found that Virginia's proportion was 76.51% and West Virginia's 23.5%.

$$\text{Ratio}\left\{\frac{.235}{.7651}\right\} = 0.30715$$

Multiplied by	$78,333,803.76
Equivalent payment by West Virginia on her share	24,060,227.82

BASIS—CONSTITUTIONAL PLEDGE.

	6's.*	5's.*	Total.
West Virginia proportion, 1861...	$6,731,361.24	$451,146.22	$7,182,507.46
34 years' interest	204%	170%	
amounts to.....	13,731,976.93	766,948.57	14,498,925.50
Total.....	$20,463,338.17	$1,218,094.79	$21,681,432.96

* See table below.

BASIS—1871-1891 FUNDING ACTS OF VIRGINIA.

The court has decided that West Virginia owed $7,182,507.46 out of a total debt of $33,897,073.82 January 1, 1861.

Under the State of Virginia Refunding Plan in 1871, 34-year bonds bearing 6% and 5% interest from July 1, 1871, were offered par for par for principal and interest of that portion of the joint debt settled for by Virginia in new bonds bearing same rates of interest. 6% accrued interest was allowed on 6% bonds and 5% for 5% dollar bonds. (Sterling bonds were extended, not exchanged.)

From the Master's report it appears that the

Amount of 6's was.....	$31,767,939.21
Amount of 5's was.....	2,129,134.61
Out of a total of.....	$33,897,073.82

debt, as of January 1, 1861.

Proportion of 6's.....	93.71882%
Proportion of 5's.....	6.28118%

On this basis, the West Virginia share is:

6's	$6,731,361.24
5's	451,146.22
Out of a total of.....	$7,182,507.46

Interest from January 1, 1861, to July 1, 1871, at—

5%—10½ years.....	52½%
6%—10½ years.....	63%

Settlement of 1871 applied to West Virginia debt:

	Principal.	Interest.	Total.
5's	$451,146.22	$236,851.77	$687,997.99
6's	6,731,361.24	4,240,757.58	10,972,118.82
	$7,182,507.46	$4,477,509.35	$11,660,116.81

Interest at 5%, July 1, 1871, to July 1, 1891, 20 years, 100%; at 6%, 120%.

Amount settled for—

Principal as above.....		$11,660,116.81
Interest at 100% on 5's.....	$687,997.99	
Interest at 120% on 6's.....	13,166,542.58	
		13,854,540.57
Total.....		**$25,514,657.38**

Virginia offered 19/28 of principal and interest in new century bonds.

19/28 of $25,514,657.38	$17,313,517.51

The century bonds have paid—

2% for 10 years to July 1, 1901	20%
3% for 12 years to July 1, 1913	36%
	56%

Value of settlement on 1871-1891 basis, as of July 1, 1913:

Principal in 1891	$17,313,517.51
56% interest to July 1, 1913	9,695,569.81
Total	$27,009,087.32

BASIS 1871-1879-1891 FUNDING ACTS OF VIRGINIA.

Total amount of settlement of 1871, if applied to West Virginia debt (from preceding statement), July 1, 1871:

5's	$687,997.99
6's	10,972,118.82
	$11,660,116.81

In 1879 Virginia offered 50% for accrued interest and par for principal in 40-year bonds dated January 1, 1879, paying 3% for ten years, 4% for 20 years, and 5% for the last 10 years.

	Per cent.
Accrued interest July 1, 1871, to January 1, 1879—	
7½ years at 6% on 6% bonds	45
One-half accrued interest	22½
Principal	100
Total settled for	122½
7½ years at 5% on 5% bonds	37½
One-half accrued interest	18¾
Principal	100
Total	118¾

118¾% of $687,997.99	$816,997.61
122½% of $10,972,118.82	13,440,845.55
Total	$14,257,843.16

Principal of new 40-year bonds:

Accrued interest to July 1, 1891—10 years at 3%	30%
Accrued interest to July 1, 1891—2½ years at 4%	10%
Total	40%
40% of $14,257,843.16	$5,703,137.26

Amount settled for in 1891:

Principal as above	$14,257,843.16
Interest at 40%	5,703,137.26
Total	$19,960,980.42

In 1891 Virginia paid 19/28 of principal and interest in new century bonds.

19/28 of $19,960,980.42	$13,544,951.00

Century bonds have paid 56% interest to July 1, 1913.
Value of settlement on 1871-1879-1891 basis, as of July 1, 1913:

Principal in 1891	$13,544,951.00
56% interest to July 1, 1913	7,585,172.56
Total	$21,130,123.56

BASIS 1891 FUNDING ACT OF VIRGINIA

Virginia paid 19/28 of principal and interest.
Debt July 1, 1861 (see preceding statement):

5's	$451,146.22
6's	6,731,361.24
	$7,182,507.46

Interest, 30 years, July 1, 1861-July 1, 1891:

At 5%	150%
At 6%	180%

Amount to be settled for in 1891:

	Principal.	Interest.	Total.
5's	$451,146.22	$676,719.33	$1,127,865.55
6's	6,731,361.24	12,116,450.23	18,847,811.47
	$7,182,507.46	$12,793,169.56	$19,975,677.02

Settlement at 19/28 in century bonds	$13,554,923.69

Century bonds have paid 56% interest to July 1, 1913.
Value of settlement—unfunded bonds, 1891 basis:

Principal in 1891	$13,554,923.69
56% interest to July 1, 1913	7,590,757.27
	$21,145,680.96

BASIS 1871-1882 SETTLEMENTS.

Total amount of settlement of 1871, if applied to West Virginia debt (from preceding statement), July 1, 1871:

5's	$687,997.99
6's	10,972,118.82
	$11,660,116.81

the 1882 settlement consols of 1871 were to receive 53% for principal and
rest in Riddleberger bonds bearing 3%.
nterest July 1, 1871, to July 1, 1882:

11 years at 5%	55%	
11 years at 6%	66%	
55% interest on $687,997.99—5's		$378,398.89
66% interest on $10,972,118.82—6's		7,241,598.42
Total interest		$7,619,997.31
ncipal of 1871		$11,660,116.81
interest		7,619,997.31
Total to be settled		$19,280,114.12
Settled at		53%
ount July 1, 1882		$10,218,460.48
erest to July 1, 1913, 31 years at 3%—93%		9,503,168.25
Amount by July 1, 1913		$19,721,628.73

BASIS 1871-1879-1882 SETTLEMENTS.

ount of settlement of 1879 (from prior statement)	$14,257,843.16
rued interest January 1, 1879, to July 1, 1882—3½ years at %, 10½%	1,497,073.53
Total	$15,754,916.69
led for July 1, 1882, at	60%
In 3% Riddleberger bonds	$9,452,950.01
erest to July 1, 1913—31 years at 3%, 93%	8,791,243.51
Total to July 1, 1913	$18,244,193.52

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Office Supreme Court, U.
FILED.
OCT 8 1913
JAMES H. McKENN
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In the Supreme Court of the United States

NO. 2, ORIGINAL.

COMMONWEALTH OF VIRGINIA, Complainant,

v.

STATE OF WEST VIRGINIA, Defendant.

In Equity.

Note of Argument in Support of Complainant's Motion that the Court Shall Proceed to Adjudicate All Undecided Questions in the Cause.

J. P. BELL COMPANY, INC., PRINTERS, LYNCHBURG, VIRGINIA

In the Supreme Court of the United States

NO. 2, ORIGINAL.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

v.

STATE OF WEST VIRGINIA, DEFENDANT.

IN EQUITY.

NOTE OF ARGUMENT IN SUPPORT OF COMPLAINANT'S MOTION THAT THE COURT SHALL PROCEED TO ADJUDICATE ALL UNDECIDED QUESTIONS IN THE CAUSE.

The exhibits printed with this motion will inform the Court of the failure of all efforts so far made looking to any adjustment by agreement between the two states of the matters not determined by the decision pronounced on the 6th of March, 1911 (220 U. S., p. 1).

It is pertinent to the present motion to recall that this cause had been already pending in this Court for more than five years when that decision was rendered, and had then been repeatedly and exhaustively argued by counsel, and considered by the Court upon the material issues presented in the pleadings, or evolved in the various stages of the litigation as it progressed; that the defendant was represented all through the litigation by some of the most learned and most resourceful lawyers in America, who made every defense which could be suggested by trained and alert minds fully informed as to the facts of the

case; that the case had been referred to a learned and able Special Master, who, aided by expert accountants, and after months of intelligent and unremitting labor, and after hearing and considering all that counsel for the parties could bring to his attention, had made the findings upon which the Court in large measure based its decision.

The decision thus made settled that West Virginia had assumed and owes an equitable portion of the common debt of undivided Virginia; and it settled the basis and principles upon which the amount of the principal of that debt should be ascertained.

It went further and applying those principles to the figures as computed by the Court ascertained the share of the principal sum due by West Virginia to be $7,182,507.46. *Virginia* v. *West Virginia,* 220 U. S. 1-35.

The Court forbore to decide what was the extent or measure of West Virginia's liability to pay interest upon her equitable share of the common interest-bearing debt of the unsevered Commonwealth.

That question alone was distinctly referred back to the two states for friendly compromise and adjustment between them, if possible.

That question was unquestionably reserved for future consideration and decision by the Court after a reference to the Special Master, in the event that the two litigants should fail or be unable to agree upon terms for its adjustment.

No other question was expressly or distinctly referred back to these litigants by the Court, though there was a reservation, in the opinion of the Court, as to the finality and precise accuracy of the computation by which the Court, applying the principles it approved to the figures it adopted, had reached the mathematical result stated.

Besides the foregoing, it does not appear that there were any controverted questions reserved by the terms of the Court's decision, and the only one of these which was distinctly referred to the two states for adjustment, was that as to West Virginia's liability for interest.

The Commonwealth of Virginia, in obedience to the recommendation of this Court, transmitted a copy of this decision to the Governor of West Virginia on May 2d, 1911, with the request that he would lay it before the Legislature of West Virginia, then soon to assemble, to the end that provision might be made for the conference between the two states as recommended by the Court. No response having been made to this communication, and no action having been taken by any of the constituted authorities of West Virginia with reference to the overtures so made by the Commonwealth of Virginia for the conference above referred to, the Commonwealth of Virginia moved this Court at the October Term, 1911, in accordance with the alternative suggestion made in its decision, to speed the cause by referring it to the Master to make and report such calculations as might be necessary for a final decree. On the 30th of October, 1911, the Court rendered its decision (222 U. S., page 17) on the motion of the complainant to speed the cause, overruling said motion on the ground that "the time had not come for granting it," the Court being of opinion that the authorities of West Virginia should be allowed, if they saw fit, to await the regular session of the Legislature to take action on the Court's recommendation for a joint conference between the two states. But the Court, in extending this indulgence to West Virginia, nevertheless, declared that "a question like the present should be disposed of without undue delay."

The Legislature of West Virginia met in regular session on the ..... day of January, 1913, and on the 21st of February adopted a joint resolution in words and figures following:

CONFERENCE COMMITTEE'S SUBSTITUTE FOR HOUSE SUBSTITUTE FOR SENATE JOINT RESOLUTION NO. 5.

(Adopted February 21, 1913.)

Creating a commission, known as the Virginia debt commission, to provide for arranging and settling with the commonwealth

of Virginia the proper proportion of the public debt of the original commonwealth of Virginia, if any should be borne by West Virginia, to take into consideration all matters arising between the commonwealth of Virginia and the state of West Virginia in reference to said original public debt, and to report its proceedings to the governor of the state.

WHEREAS, The commonwealth of Virginia instituted a suit in the supreme court of the United States against the state of West Virginia, to have the state of West Virginia's proportion of the public debt of Virginia as it stood before one thousand eight hundred and sixty-one, ascertained and satisfied; and,

WHEREAS, At the October term, one thousand nine hundred and ten, the supreme court of the United States made a finding that the share of the principal debt of the original commonwealth of Virginia to be borne by the state of West Virginia, was seven million one hundred and eighty-two thousand six hundred and seven dollars and forty-six cents; and,

WHEREAS, Said court did not fully and finally decide the question involved, but suggested that such proceedings and negotiations should be had between the states upon all the questions involved in said litigation, as might lead to a settlement of the same; therefore, be it

Resolved by the Senate of West Virginia, the House of Delegates concurring therein:

That a commission of eleven members, known as the Virginia debt commission, is hereby created. The members of said commission shall be appointed by the governor, two of whom shall be chosen from each congressional district of the state, and one at large, not more than six of whom shall belong to any one political party, and all resignations or vacancies in the said commission as they occur shall be filled by the appointment of the governor.

Said commission is authorized and directed to negotiate with the commonwealth of Virginia, or with any person or committee owning or holding any part of the said indebtedness for a settlement of West Virginia's proportion of the debt of the original commonwealth of Virginia proper, to be borne by the state of West Virginia.

The commission is hereby directed to ascertain and report upon and give the utmost publicity to all the facts in relation to the pending suit instituted against the state of West Virginia

by the commonwealth of Virginia, and to ascertain and report upon and give like publicity to all the facts and conditions under which the West Virginia certificates are held or owned, together with the names and residences of the persons having the legal or equitable right to receive from West Virginia whatever may be ascertained to be payable thereon.

To ascertain and report as to any part of the Virginia debt claimed against the state of West Virginia, which is owned or held or claimed to be due, at law or in equity, by the commonwealth of Virginia in her own right; and having made the investigation required hereby, said commission is authorized and directed to negotiate with the commonwealth of Virginia for a settlement of West Virginia's proportion of the debt of the original commonwealth of Virginia proper, to be borne by the state of West Virginia.

A majority of said commission shall have authority to act. The commission shall choose its chairman and appoint its secretary and other necessary officers.

The expenses properly incurred by the commission and its individual members, including compensation of said members at the rate of ten dollars per day for the time actually employed, shall be paid by the state out of the moneys appropriated for said purpose.

The commission shall make a report to the governor as soon as practicable, and upon receipt of said report the governor shall convene the legislature for the consideration of the same.

The commission is hereby authorized to sit within or without the state and to send for papers and records, and to examine witnesses under oath.

Pursuant to this resolution the Governor of West Virginia appointed the eleven members of the West Virginia Commission therein provided for, and on the 25th of July the commissions of the two states met in joint conference, and the proceedings of said joint conference, stenographically reported, are filed as Exhibit B with the printed motion of the complainant.

With profound regret we have to show the Court that West Virginia has failed to accede to the suggestions of the Court and the invitations of Virginia, repeatedly made and urged by her representatives, in obedience to the views and suggestions of the Court.

As will be seen from the stenographic report of the conferences and communications between the commissioners of the two states, the West Virginia Commission would agree to no negotiations with Virginia unless, ignoring the decision of this Court and all the vast expenditure of time, labor, and money, which it cost the parties to reach that result, the Virginia Commission would agree that, surrendering the just rights under that decision of Virginia and her creditors represented by her, the whole case, and all the questions which had been, or could be, raised in the case, should be opened up and considered *de novo* just as though no decision had been made by the Court.

The Court will see from the frank and explicit statements made by the Chairman of the West Virginia Commission, speaking for and by authority of that Commission, that the only basis upon which that Commission was willing to negotiate, was that the whole subject matter of the controversy between the two states should be opened up and gone into, by the two commissions *de novo; and that even that should be done without any purpose or power on the part of the West Virginia Commission to settle anything, to determine anything, or bind West Virginia to pay one dollar of either principal or interest.*

This abundantly appears from the record of the joint conferences between the two commissions printed with this motion. (See pages 14, 26, 27, 31, 32, 39, 41, 43, 44, 45, and 46, of motion.)

The Virginia Commission was prepared, and was empowered, with the approval of the Attorney-General of the Commonwealth, to negotiate and to make a compromise settlement with West Virginia, both of the rate and amount of interest to be paid by West Virginia, and of the time and mode of payment of both principal and interest, or to agree a lump sum which West Virginia might pay, in discharge of her entire liability, including principal and interest as of the date of such agreement; and to agree that the terms of any such final

adjustment should be embodied in a consent decree to be entered by this Court in this cause; but they could not with fidelity to the trust devolved upon them, or with due respect for the Court, agree to ignore the decisions of this Court, and all the work done in this case, and embark upon an inquiry which meant nothing but hopeless and indefinite delay. They could not consent to take the case out of the hands of the Court, and refer all questions *de novo* to the decision of the two commissions.

If there were no other insuperable objections to such a course the inevitable delay which such a procedure would involve would be sufficient.

It must be remembered, however, that the West Virginia Commission was not only unwilling to agree to conduct any negotiation which was limited to the question actually referred by this Court back to the two states for adjustment, but was *powerless to make any agreement* which would bind West Virginia in any particular; that they were clothed, in the language of their Chairman, with "only limited advisory power," or powers of inquiry, and could do nothing which would settle anything. Even if the West Virginia Commission should reach a conclusion, and it should be such a result as the Virginia Commission could accept, it would not bind West Virginia. It would settle nothing, but would leave the whole matter to be fought over in the West Virginia Legislature, and before the people of that state on the hustings and at the polls. Nor can we, in this connection, overlook the fact that the people of West Virginia have, for a generation, been taught to believe that West Virginia does not owe, and, whether she owes or not, can not be compelled to pay one dollar of this debt.

If, therefore, the Virginia Commission entered into negotiation with the West Virginia Commission, it must be upon unequal terms, for, while the Virginia Commission could with the concurrence of her Attorney-General commit Virginia, the West Virginia Commission could not bind West Virginia to any proposal, or any terms whatever.

Although any negotiation under such conditions would be unfair to Virginia, yet such was the desire of her representatives to do all in their power to bring about a settlement of this controversy that the Virginia Commission was willing to enter upon a conference with the West Virginia Commission for the purpose of adjusting, if possible, the question of interest, which, under the facts and circumstances of this case, because of West Virginia's delay in making any settlement, constitutes the largest item of Virginia's equitable claim against West Virginia; but the West Virginia Commission declined to enter into any negotiation upon any such basis, and insisted upon the condition that any negotiation should embrace *de novo* the whole question of West Virginia's liability, "if any," principal and interest.

It must be apparent from what transpired between the two commissions that no satisfactory result could have been reached by negotiation, whether it was unlimited in its scope, or limited to the question of interest, and that any efforts along either line would only lead to delay, as anything which the West Virginia Commission might conclude would be merely "advisory," and would have to go back to the Legislature and people of West Virginia.

The West Virginia commissioners were undoubtedly constrained by the terms of the Act from which they derived their existence and their powers.

The terms of that Act are such as:

(1) To give the Commission created under it no powers to even negotiate with the Virginia Commission until there had been compliance with certain remarkable conditions, which could serve no purpose except delay.

(2) To so limit the powers of the Commission, which it created, as to make them merely inquisitorial and to a "limited" extent "advisory," so as to discourage any hope that any adjustment or settlement would ever result from any negotiation

between it and the Virginia Commission, if the latter should be willing to enter into a negotiation upon such unequal terms.

(3) To require that such negotiation should embrace the entire subject matter of the whole original controversy between the two states; namely, in the language of the Resolution of the West Virginia Legislature, the "Settlement of West Virginia's proportion of the debt of the original Commonwealth of Virginia proper, to be borne by West Virginia."

A careful reading of that Act is all that will be needed to show the justice of the foregoing criticism.

The preamble declares that it is the purpose of the Act to create a Commission and provide for arranging and settling the "proper proportion" of the public debt of the original Commonwealth of Virginia, "*if any,* which should be borne by West Virginia," and "to take into consideration *all* matters arising between the Commonwealth of Virginia and the state of West Virginia in reference to said original public debt."

The following paragraphs of said Joint Resolution define the powers of the Commission to be created pursuant to its terms:

> "Said commission is authorized and directed to negotiate with the Commonwealth of Virginia, *or with any person or committee owning or holding any part of the said indebtedness* for a settlement of West Virginia's proportion of the debt of the original Commonwealth of Virginia proper, to be borne by the State of West Virginia.
>
> "The commission is hereby directed to ascertain and report upon and give the utmost publicity to all facts in relation to the pending suit instituted against the State of West Virginia by the Commonwealth of Virginia, and to ascertain and report upon and give like publicity to all of the facts and conditions under which the West Virginia certificates are held or owned, together with the names and residences of the persons having the legal or equitable right to receive from West Virginia whatever may be ascertained to be payable thereon.
>
> "To ascertain and report as to any part of the Virginia debt claimed against the State of West Virginia, which is

owned or held or claimed to be due, at law or in equity, by the Commonwealth of Virginia in her own right; and having made the investigation required hereby, said commission is authorized and directed to negotiate with the Commonwealth of Virginia for a settlement of West Virginia's proportion of the debt of the original Commonwealth of Virginia proper, to be borne by the State of West Virginia.

"A majority of said commission shall have authority to act. The commission shall choose its chairman and appoint its secretary and other necessary officers.

. . . . . .

"The commission shall make a report to the governor as soon as practicable, and upon the receipt of said report the governor shall convene the legislature for the consideration of the same."

It is manifest that the Commission is given merely inquisitorial and ministerial powers; powers which its distinguished Chairman described, as stated in a former part of this brief, as "advisory," though that definition is hardly justified by the extraordinary language of the Resolution.

It is true the Commission is empowered to "negotiate," but that is as far as they can go. Any proposition for a settlement which might result from such negotiation would not bind anybody (unless, indeed, Virginia, should be bound).

So far as West Virginia is concerned, it would not even have the force or dignity of a *proposal.* It would be merely a suggestion or recommendation from her commission, as to which the only function of the Commission would be to report it to the Governor of West Virginia, who would lay it before the West Virginia Legislature, which he would thereupon convene. It would have neither force not effect unless, and until, it should be approved and adopted by that legislature.

That body, made up of many men of many minds, might approve the Commission's Report *possibly;* or they might make material amendements in it and adopt it as thus modified; or they might repudiate it entirely and appoint another com-

mission to "negotiate"; or, what is not improbable, they might submit it by a referendum to a popular vote.

The Court has said, "the conference suggested by the Court is a conference in the cause—not for an independent compromise out of Court, but an attempt to settle a decree." (*Va.* v. *W. Va.*, 222 U. S. 17.) The Resolution of the Legislature of West Virginia fails to respond in any particular to this declared purpose of the Court in suggesting this conference. The terms of the Resolution not only prohibit the Commission from consenting to a decree, but from consenting to anything else, and absolutely preclude the hope that any progress can be made towards a settlement of this controversy through the means suggested by the Court.

But perhaps an equally fatal vice in this West Virginia enactment is that by its express terms the Commission it creates is powerless even to "negotiate," until it has done certain other things and ascertained certain facts, some of which it may require months or years to ascertain, if, indeed, they can ever be determined.

It makes no difference that these facts, or their ascertainment, are absolutely irrelevant to any question as to the nature and extent of West Virginia's liability to pay an equitable portion of the principal and interest of the debt. This Resolution is the only power of attorney under which said Commission can act at all, and its functions and powers are absolutely limited by the terms of that Resolution, even though those terms and conditions should be unreasonable and absurd.

If the language of the Resolution means anything, it requires said Commission:

> "(1) To ascertain and report upon and give the utmost publicity to *all facts in relation to the pending suit* instituted against the State of West Virginia by the Commonwealth of Virginia, and to report upon and give like publicity to *all of the facts and conditions* under which the West Virginia certificates *are held and owned,* together with the *names and residences of the persons having a*

legal or equitable right to receive from West Virginia whatever may be ascertained to be payable thereon;" and,

"(2) To ascertain and report as to any part of the Virginia debt claimed against the State of West Virginia, *which is owned by the Commonwealth of Virginia in her own right.*"

And then follows this extraordinary provision:

" . . . and *having made the investigation required hereby,* said Commission is authorized and directed to negotiate with the Commonwealth of Virginia for a settlement of West Virginia's proportion of the debt of the original Commonwealth of Virginia proper, to be borne by the State of West Virginia."

It is manifest from this language of the Resolution that the West Virginia Commission is powerless even to negotiate with Virginia, until it has made and completed the investigation directed by the Resolution to be made.

Any negotiation between that Commission and the Virginia Commission was, and will be, *ultra vires* as to the West Virginia Commission, until it has completed said investigation.

It matters not that said investigation can throw no possible light upon the question of West Virginia's liability; or that it is entirely foreign to the purpose of the Court in suggesting this conference; or that it will lead to indefinite delay. *Ita scripta est lex,* which defines the Commission's power to "negotiate," and that requirement must be, to say the least, substantially complied with before the West Virginia Commission could enter upon any negotiation with Virginia for any settlement of West Virginia's share of the debt.

The branch of the investigation, requiring the ascertainment of all the facts in relation to the pending suit, is so vaguely defined in the Resolution, that it is difficult to understand what is meant by it. But *all the facts in regard to that suit,* whatever that may mean and however irrelevant and valueless, must be investigated by the Commission before it can begin to negotiate with Virginia.

The bill and exhibits in the cause show the facts, "under which the West Virginia certificates are held," but the ownership of these certificates is constantly changing, and, in the nature of things, it would be difficult, expensive, and, indeed, impossible to ascertain the "names and residences" of the owners at any given date. This is, therefore, not only an irrelevant, but an impracticable condition precedent, which the West Virginia Resolution requires to be performed before her Commission is authorized to begin negotiations.

The portion of the debt "claimed against the State of West Virginia, which is owned by the Commonwealth of Virginia in her own right," can be ascertained from the records, but that is a matter of no interest to West Virginia, and would be absolutely valueless in determining her liability in this cause. Nevertheless, the West Virginia Resolution makes the investigation of the facts as to Virginia's interest in her own right a condition precedent to any negotiations with Virginia.

These provisions of the Resolution are but added proof of the impossibility of any settlement with West Virginia ever being reached under that enactment.

On behalf of the Virginia Debt Commission, of the counsel for Virginia in this cause and of the Commonwealth whom they represent, we beg to express deep regret that the efforts of Virginia to bring about a settlement with West Virginia, in accordance with the suggestions of the Court, have met with no success. Candor also requires us to say that there is nothing in the situation which justifies the hope that any adjustment will, or can ever, be made between the parties litigant—a condition for which Virginia is in no degree responsible.

In these circumstances, the complainant, the Commonwealth of Virginia, submits that there is no rational ground to hope for any advantage to result from further negotiations, and we respectfully submit that the time has come for the cause to be speeded, and, to that end, we earnestly ask that it may be referred to the Master, with instructions to ascertain and

report forthwith to the Court the amount of interest which the State of West Virginia should be required to pay on the principal sum already ascertained by the Court, and to make such other calculations as may be necessary to a final decree.

Respectfully submitted,

SAMUEL W. WILLIAMS,

Attorney-General of Virginia.

WILLIAM A. ANDERSON,
JOHN B. MOON,
RANDOLPH HARRISON,

Of Counsel for Virginia.

October 6, 1913.